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Partnership for
Business Competition

COMPETITION LAW AND ITS REGULATION IN INDONESIA

ELIPS IN COOPERATION WITH
PARTNERSHIP FOR BUSINESS COMPETITION

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1.1 Benefit of Competition

Indonesian people, well known with their **personal closeness**, prize so highly **togetherness**, **mutual aid**, and **solidarity** that *competition* seems to be **alien** to them, even, seems to be contradictory to *togetherness.* Competition regarded as selfish conduct by which somebody might do everything (illegally) to prosper and to appease himself by obliterating other competitors, cheating consumers, corrupting small businesses, and oppressing the weak and the poor. Due to this view, competition captured as **a taboo** by Indonesians, even as a right for exploiting others in order to accumulate profits.

While we observe public's performance in several activities, we shall find out the importance of competition in improving the current performance. Just for an example, Our National football Team has not been improving since 1980 up to now. In addition, while we consult to the experts and lovers of football, they simply answer that the source is lack of competition in and out of the country. It is important to know that to create a competition needs to build such a competition climate.

What might happen while no competition prevails? First, we do not know whether we have had an optimum performance, because we view everything subjectively and admit the best to what we have done. However, while competition exists in our surrounding, we might compare our performance to others'.

While feeling inferior to B, A will try hard to top B, at least to keep up with him. In addition, while A has topped B, B will get the similar action to get back to original position. Although A's performance could not top B's, B will always defend his position, and vice versa. We could find many illustrations, above all, from the world of sport. Competition made Indonesian Badminton Team work hard to keep the position. Competition could create the new records that might be used as a measure of performance therefore each athlete thrives to gain the top record. These conditions imply the contribution of competition in the improvement of performance.

1.2 Performance Measurement in Economy

How is actually business competition? Does competition encourage business actor's performance also? Business competition does bring about better performance. To measure business performance, one might take the advantage of products, services and commodities. Let us look into the next simple illustration. Supposing there were a single mango seller in certain area, with no competitor, with 150 buyer candidates who each would pay Rp. 2500,00 a Kilogram. Should the trader purchase 150 kilograms of mango? It is doubted. Remember that he does not have competitor, he might sell as many mangos as he wants. It could be 100 kg, 50 kg, or even only 30 kg. Meanwhile if he sells only 30 kg, 120 customers would not have any mango. Instead of imagine what might happen while putting up all mangos for auction. He could mark up the price higher than while selling 150 mangos. While the trader could sell off 150 kg at Rp. 2700,00 each Kg, by providing only 30 kg, he might purchase them in Rp 15000,00 each kg.

What if another trader enters this market area, the former could not purchase only 30-kg mangos, because the latter might sell the same quantity with the lower price such as Rp. 8000,00. This condition makes the first trader mark down the price at least until the same level. What if ten more traders take part? Obviously, the price would be lower (cheaper), because there is excessive quantity of mango in market. To raise the current price (Rp

8000,00) is out of question. But if each trader purchases 150 kg, it could be assumed that the price would return to the early price (Rp 2700,00). The above illustration brings into conclusion that business competition marks down the price so that consumers might take benefit of it.

As mentioned above, price is one of the means for measuring market conduct. And the next two means are the quantity and quality of product. The foregoing example in the above passages implies that competition does not only decline the price but raises available commodities' quantity also. Basically, quantity of commodity and price ratio relates each other. While there is fewer commodities, price is likely to be expensive, while more commodities, price cheap.

From the point of view of product quality, the next illustration will discuss about quality improvement. Supposing there are only 30 mangos available in market. Under this circumstance, buyer could not select the qualified one. Otherwise, while there is competitor, consumer can freely choose. In such case, sellers must improve the quality of their product so that they could sell off the product, or at least improve the product up to the same level of others'. But while traders increase in number, for example, there are 15 traders providing 200 kg for 150 customers, they could only sell out the qualified ones. In addition, when this happens, traders are supposed to sell the qualified mangos and to keep away from being included in the group owning unqualified mangos (50 kg). And if they are included, they supposed to thrive to make best the products if they want to sell them out.

The next measure, for clarifying business competition performance, is service ratio. The foregoing illustration implies that those mango sellers won't sell their mango under Rp 2500,00 a kilogram or otherwise, they will sustain a loss. If the price can't be marked down, and meanwhile, mango can't be technologically ameliorated in quality. What should traders do in order to sell out the product? The only way is to improve services, such as in the form of better packing, home-delivery, and warranty in case the mango does not meet the consumers' demand. Those above examples might be reasoning for the positive value of business competition.

2.1. Market and Its Mechanism

According to economics, perfect competition market is an ideal market. It is characterized with:

1. Homogenous Commodity
   It happens while mango is the only commodity and while we talk about the identical type and the same quality of mango.
2. Numerous sellers and buyers
   No literature points out exact number. It could be 20, 100, or even 100. Any way, while there are a lot of buyers and sellers, price could not be fixed freely by either buyers or sellers. Using the illustration of mango sellers as mentioned in the foregoing paragraphs, we would explain more profoundly the case with the infiltration of the 16th seller and so on in market. So, there are excessive sellers for existing buyers, and in effect, the 16th seller or the followings inevitably must submit to the current price. For example, while the fixed price is Rp 2700,00, no seller dares to fix different (higher) price.

In such condition, economist views that the price is under control of market mechanism in which sellers give in to whatever market decides. The quantity of commodities prevailing in the market does not affect the fixed price so that traders in such this market (perfect competition market) will only earn profit inasmuch as the sold-out product. Thus, desire for a better sale leads to the more tight competition.

3. No *entry barrier* for each seller in perfect competition market. Each mango seller might hold any transaction and cease it at any time he wants. This kind of market might suffer a light cost risk while it has to stop selling. One reason that pushes the business actor to enter the market is earning the profit. So, the lighter the cost risk, the stronger the desire of business actor for taking part in the existing business.

There are a lot of markets nearly fulfill perfect competition market characteristics. This symptom is clearly recognized through the trend of traders to imitate the profitable commodity that anyone runs. For example, the emerge of VCD or LD rental, Tent Café (kafe tenda) in Jakarta, pepper plant (while this kind of plant is highly priced), or cricket and worm nourishment.

4. In perfect competition market, either seller or buyer recognizes perfectly all information rampant in market. So each buyer knows that the current price of mango is Rp. 2.700, - a Kilogram and that there is no chance for seller to alter the price. So both seller and buyer know exactly what might take place in market.

Looking back into the above 4 preconditions, we'll catch some complicated conditions, mainly concerning number 1 and 2. We barely find the homogenous goods/services and the perfect information. That is why perfect competition market is so ideal that its standard will be used as reference for the performance of other markets. Moreover, to know its virtuosity, it is necessary to compare it to the other sorts of market.

2.2. Monopolistic Market

This type of market is contradictory to the perfect competition market. Monopolistic market has only one surviving seller that might fix the total commodity all by himself. The total commodities depend on the expected profit. To be rationale, the seller will fix the most profitable price. Referring to the illustration of mango seller, so, there will be one surviving mango seller in market. With Rp.2500.00 a kilogram, we are supposing that there are several alternatives to fix the price.

Table 1.1

Quantity	Price	Income	Cost	Benefit
20	20.000	400.000	50.000	350.000
30	15.000	450.000	75.000	375.000
60	8.000	480.000	150.000	330.000
100	4.000	400.000	250.000	150.000
150	2.700	405.000	375.000	30.000

Based on the above alternatives, the seller would rather purchase only 30 kg due to its most profitable price, even though it's not the highest price anyway. In such circumstance, buyers inevitably have to comply with the price fixed by that single seller. Thereby, the seller is a very powerful (absolute) price setter, who might fix the price through controlling the total commodity in market. Due to this, The price in monopolistic market will always be higher than that in perfect competition market.

Why could this market happen? The main cause is that there exists an entry barrier for almost each business actor. There are some important determinants. First, There is excessive capacity of production to meet the production scale that the public might achieve. For example the capacity of electricity needed in an island is 1MW, whereas the technology only supplies 0,8 MW. Therefore, the earlier company has to implant generator bearing the capacity 0,8. And the rest (0,2M) is not attractive at all to other firms to come up in this competition. That's why this condition is namely *Natural Monopoly.* This kind of monopoly might happen also while the seller has a specialty in goods/services such as particular taste and appetite of food, or specific style of dress.

Even monopoly might happen when the government draws up any law or gives in any privilege to any group of companies such as patent right, trademark, and copyright. Those kinds of recognition might set up a barrier to other groups to enter the market, and as consequence, monopoly on certain mark or commodity occurs. Monopoly might also take place while the government points out certain business actor to handle certain product/market. The law that the government produces concerning this problem called *business administration.* Due to the superiority of monopoly to fix the price and gain the profit, each seller fights for being the only surviving business actor in the market. So, they try hard to achieve this goal.

2.3. Technical Production Efficiency

In line with the problem of goods and prices providence, we might also use efficiency to estimate the performance. In perfect competition market, price is so relatively low that seller could not control it. So the only way to increase the profit is to decrease as much as possible the production cost. It might be in the form of producing goods with the lower price as possible or of spending the same cost to produce goods as many as possible. Therefore, Economist names this **technical efficiency**.

To measure this efficiency, one usually takes the advantage of the average cost for producing certain type of commodity. It is because the decline of the average cost for production impacts positively on the production efficiency. And then this condition finally brings about such a competition that has producers compete in reducing the production cost. Even this perfect competition enables sellers/producers produce so efficiently that the consumers might get the lowest price and the more abundance of available products to choose.

How about monopoly? Selling as many products as possible, in perfect competition market, does not guarantee any company to get the maximum profit. The company had better impose on the marginal profit caused by market reaction against the augment of products instead of lowering the production cost. Table 1.1. points out that the maximum profit might be achieved while purchasing only 30 kg of the demand (150kg).

In such case, the producers won't care about efficiency, the quantity of product and its cost mean nothing to them, because they have to bear that high price anyway. So, generally, the monopolistic market doesn't care about the efficiency of production.

2.4. Allocation efficiency

Allocation efficiency is the efficient usage of resources. In reality, this kind of efficiency is hard to estimate. However to economist, it is very necessary and guides vividly to both seller and buyer how to exploit the resources available in the public. To reflect on this matter carefully let's reuse the foregoing illustration. While the mango seller encompass perfect competition market in which 150-kg mangos priced Rp. 2.700.00 a kilogram are traded. The traders will soon realize that if they compete they will earn a little profit. Therefore they'd rather found an association in which they act collaboratively so that they are no longer in perfect competition market since then. As a consequence, they begin to collaborate and perform as monopolist does, decreasing the aggregate production and marking up the price.

What is going to happen then? As told in the above passages that the price will rise to Rp. 15.000.00, while the available mango is 30 kg. Hence, there will be some items to be our concern:

1. The increase of the price Rp. 12.300.00 a kilogram suggests the conversion of consumer's profit to producer's profit. Therefore in the monopolistic market, producers could take over the consumer's amenity to be their additional profit.
2. The aggregate expense of the public for mango augments from Rp. 405.000.00 to Rp. 450.000.00. To the consumers, on the one hand it means the increase in expense, and on the other hand the decrease in amenity for consuming other goods/services.
3. The increase in expense might decrease the consumer number from 150 customers to only 30.

Compared to the increase of the resources spent on mango production/consumption, this condition sends an impression of lavishness.

2.5. Monopoly always profitable?

Monopoly is commonly profitable, but not always. Although the monopolist is a price setter, notice that price can only be fixed by the actual demand. But the natural monopoly might set up the price highly higher than the demand. Let's look over the illustration of the supply of electricity in an island with the minimum capacity 0.8 MW. The next island is assumed to demand only 0.2 MW. Whereas the supplier has to provide 0.8 MW or not at all. The reasonable undertaking won't supply the electricity while the demand is lower than the capacity he has. First, because this very small demand causes the price lower than the average production cost; second, if he reduces the production cost by increasing the aggregate production, the current production would be still absorbed in market. But, as a matter of fact, electricity is a vital infrastructure to the public. Therefore, there should be, willy-nilly, any company supplying this demand. And as a consequence it will sustain such a loss that the government takes over it.

3. Other types of market

3.1. Oligopoly

It is one of the market types standing between monopoly and perfect competition market. This kind of market is indicated with the presence of some sellers and of relatively a number of buyers. Compared to the traders in perfect competition market, each of those in oligopoly has an authority for controlling market. Therefore, in this market, traders might compete or even collude. If they compete, the result is similar to that of in perfect competition market. Thereby, the sellers thrive to provide the best services for consumers. Instead of perfect competition market, the price competition, in oligopoly market, will stop in certain level, because all of the sellers are the price setters, and the price won't reach the cheapest level as may happen in perfect competition market. The rivalry then focuses on the type of production and services.

One of the oligopolistic market benefits might be obtained by consumers is the perpetual increase in product quality. This market usually could get such an appropriate benefit that producers might always spend some of them on research and product quality amelioration. Of the monopolistic markets beneficial to the consumers are automobile market, computer market, and telecommunication market. In addition to product quality, quality improvement is one of competition determinants. The vivid sample for this is services market, such as banking and insurance services. So, they compete in providing good services, not prices. But the public believes that this kind of market will end in allocation inefficiency since their sellers are still the absolute price setters. So, the only market that probably achieves allocation efficiency is the perfect competition market, which is the ideal standard for analyzing the fact in the world of reality.

As mentioned in foregoing passages, that the sellers in the monopolistic market might collude instead of competing. Through collusion, they might settle an agreement, whether explicitly or implicitly, to fix the price, to determine the total market area or to classify it geographically or accordingly with the prevailing strata. As in effect, this collusion provides an access for them to greatly influence the market.

That condition finally results in the decreasing available commodity in market and the increasing price that consumers have to pay, and the growing allocation inefficiency. Even the perfect monopoly makes them jointly monopolize the market or exclusively in each own area. While this condition takes place, there will be no improvement in goods and services quality, but otherwise, a decline.

In the case of oligopoly, all or some sellers might relatively have the equal effect on market. The main standard defining whether the market might be classified as perfect competition market is whether the seller is capable of controlling the market or of fixing the price. The market can not be called perfect competition market, since, practically, only one or two sellers affect it. Although in fact there exist 200 sellers in market.

3.2. Dominant Position

Dominant position could be seen through the power of certain undertakings to control market segment and of price setting to which other sellers usually submit. This kind of power, to Economics, is namely *monopoly power,* which can be estimated through the difference of price and marginal cost. As commonly known, the price is equal to the marginal cost in the perfect competition market, so, no difference. The bigger the monopoly powers the greater the difference of the applied price and the marginal cost. Therefore, the sellers that have the dominant position are likely to act as the monopolist sellers, due to their decisive role. They might set the price and an entry barrier for the newcomers or the unwanted sellers.

4. Business Attitude Potential

The reasonable undertakings will try to maximize the possible profit might be obtained. And this goal might be gained while they manage to dominate the market and to decide on what shall happen in it. Therefore, it's ordinary that the undertakings build up an entry barrier for the others. Those next paragraphs are going to apprise the actions that might be fair or law transgressing, generally done by business actors.

4.1. Price Fixing

It is the most classical method, in which the two or more traders agree with their standard price. The agreement either could be written or just be settled orally. In fact, in oligopoly market, the other sellers will take after the action of the dominant sellers without any agreement but only an implicit coding. For example, while the dominants set a certain price, the rest of the sellers will comply with the decision and so forth. Another way to set a price is with announcement or article in any press that mentions the urgency of mark-up so that the other sellers know and follow this decision. This case is a disguised collusion that is, in economic literatures, commonly called **tacit collusion**.

Price fixing agreement, whether it is open or disguised, breaks the principles of competition. This action makes the consumers sustain a loss, the higher price and the limited available goods. Therefore, according to the law of price fixing, this kind of agreement is not allowed. But in some cases, the law does not prohibit price fixing. That is the price fixing undertaken by the government. For example, while the existing domestic flight companies got involved in price competition, the government tried to consolidate them by setting the price obligatorily obeyed by all flight companies. This decision economically had decreased the public prosperity and in effect increases allocation inefficiency. The other example of price fixing is UMR (regional minimum wage).

4.2. Predatory Pricing and Pre-emptive Expansion

Another way to obstruct other competitors to enter market is predatory pricing, that's by fixing the temporary **slash price** so that others won't enter the market due to too low price for gaining profit. However, not all the slash prices regarded as predatory pricing. Predatory pricing, to economy, is fixing the price far lower than the average variable cost. In the real world, it is so difficult to undertake predatory pricing. The practitioners say that it is an action of price fixing under the average cost or of **selling at a loss**.

The other action, which is usually undertaken, is fixing such a production capacity that gives no chance for other competitors to enter the market, due to its unreachable economic scale. The fixing of the production capacity might be done long before the entrance of newcomers or some moment before their appearance.

The former action is done while establishing the business/company. That is to determine the production scale much greater than the actual aggregate production. So, when any competitor comes up, the business actor will oversupply the market with his excessive product. Therefore, the chance is limited for other business actors and the price declines so that the newcomers doubt to enter the market or even cancel it.

The latter is worked on the field that needs a long period of construction. Practically, it is only for blustering at other competitors, means no serious.

The last two actions are classified as *pre-emptive expansion.*

4.3. Cartel

Cartel is an official collaboration of two or more sellers/buyers that holds an agreement to perform some activities in behalf of their common interest which may prevail in the form association, common market or likewise. *Common interest*, in this term, is intended on how to earn better profit than while working out collaboratively. Hereby, Cartel can do a lot of activities, such as fixing common price, aggregate production, area distribution, or a combination of these. As told before, resources allocation reaches the highest efficiency while market exists in such perfect competition condition. Whereas, in imperfect competition market the profit of sellers /producers can not be increased but by decreasing the profit of consumers. In regard to this, OPEC is a classical sample of cartel, in which some exporting countries commit to limit the quantity so that they can mark up the price higher than the former value. While, before the existence of OPEC, the oil price is about $ 3 US, but after, rises up to $ 33 US a barrel.

Theoretically, each cartel, in the long term, will find out that there always appear some corruptive members in the firm. Furthermore, the increase in price and profit rate encourages other business actors to join in the market or create the cheaper alternative technology/substitutive goods. However, to consumers, cartel is admittedly damaging, because it corrupts consumer's profit.

4.4. Merger

The other way that sellers take to extend their control over the market is merger, which is an official combination of two or more firms. It happens while some firms either merge, or turn out to be any division of the bigger firm, or affiliates to others, or combine into a newly bigger firm. The merging firms view that efficiency, by which price might rise and quality improve, is the only reason for merger.

While to Economics, in a certain point, the bigger the business scale, the cheaper the average production. But according to the point of view of market control, merger means increasing market control in order to extend monopolistic power of the combined firms. In the country, which Antimonopoly Law exists, all merger firms must be reported and analyzed before their establishment. The firms should also consider whether merger is the only way to achieve efficiency. If doing so, the merger is only to disguise in order to increase market control and set up barriers to competition climate.

4.5 Vertical Integration

According to Economics, Merger requires the identical types of firm. But practically, it may happen that varying types of firm do so on the condition that they are involved in production chain. The economist calls this type as **vertical Integration**. The reason for undertaking Vertical Integration is efficiency, the same as that for merger. And to achieve efficiency, Vertical Integration needs to force control system and to find out the slimmed and centralized decision. The fewer the decisions the more coherent the policy for handling production process. So while achieving much more efficiency in the whole production, the firm expends cheaper productions cost, and in effect, the aggregate product increases as the price declines.

Thereby, Vertical Integration might happen while the firm that produces raw material and the one that produces finished good combine into one; or it might happen amongst producers, brokers and marketing firms. The extreme sample we may take is paper industry in which several industries might establish to support this kind of industry, from processing the raw materials to producing the finished goods. Therefore, the process starts from (1) Wood Producer's Company, (2) Pulpwood Producer (3) Paper Producer (4) Paper distributor (5) Marketing Company, and so on.

The positive side of vertical integration is that each company might mark down the price rate, because the transaction happens within the company and the decision relies on the single hand, Parent Company. Consequently, on the one hand, the price becomes lower in consumer's level and the aggregate commodity increases on the other. That is why, to the countries that implement Antimonopoly Law, like our country, Vertical Integration admitted legal.

But, it might happen that this kind of merger sets up a barrier to competition because it commits a transfer pricing in one production level. For example, the paper producer's company presses down the selling price towards the distributors' company in the same group in order to reduce the production cost so that lower than that of competitors, as in effect, blocking the competitors' growth or even evicting them.

According to the side of bookkeeping, it seems that no corruption will exists or be done by distributors. However, it might happen while the production cost and the earning are both low, or to Economist, it might happen along with the further process of pricing. So, if the main goal of group of firms is to take over completely the market, the price might return to the level whence the competition emerges or even, this condition might speed up the price higher than the competition price. Finally, this negative action, which is done by those who apply vertical integration, end in higher prices and fewer commodity that are very contradictory to their real goal.

4.6. Competition at buyer level

Besides, at seller level, competition might happen at buyer level. The above samples have clarified all condition of varying competition level on seller's side under-assumption that buyers are facing a perfect competition. Referring to the foregoing illustration that talks about mango market in certain place, we have known that buyers compete tightly (perfectly) to find the desired mango. However, shall the same condition happen while buyer don't compete anymore? It is surely not. The case of Clove Business Administration by mid 1990 is a vivid evidence for this. Initially, we shall assume that clove producer and its seller identical to clove farmer. Mean while, at this level, the producers had to compete tightly because there were so many clove farmers that they could not fix the price. Before the running of this kind of business administration, the clove buyers, mainly from clove farmers grew in such a great number that market, although not parallel to perfect competition, was likely to be very competitive. The current average cost for dry clove in the time being was Rp. 7500.00 a kilogram. Consequently, due to The Clove Business Administration, BPPC turned out to be the only buyer and managed to monopolize the price.

To economics, This kind of market is namely *Monopsony*. But this system doesn't imply a single buyer only but multi-buyer also, similar to Oligopoly concept. But while market is dominated by a group of buyers, it is categorized as Oligopsony. Although each of those two markets has a specific method of impact estimation on buyer, each principally marks down the price lower than the level in which the competitive buyers prevail. Those two kinds of market might appear not only because of government's law, but of buyer's cartel and natural way also, such as what has happened to agricultural commodity, industrial raw material and labor market.

4.7. Market Domination

The foregoing passages have explained that market domination has been a strategic variable for company to gain market force, which is meaningful to mark up the price higher than what it should be in competitive market (supra-competitive price). And if doing so, company could gain better advantage (big incentive), whereas consumers sustain a loss due to highly price products.

Through a fair competition, company might achieve market domination. For example, selling the cheaper product than others', a company might improve efficiency so that it could take over the market area of other competitors and in the long term dominate market product. Otherwise, while a company commits unfair competition to dominate market, a big disaster might come up.

One of ways, of which company usually takes advantage to kick competitors away, is **refusal to deal**. Eastern Kodak Co., of photographic apparatus companies, used to undertake this method. Therefore, to control the line of photographic apparatus distribution, Kodak had to take over all brokers' industry of this apparatus. To those who did not want to give in, as happened to Southern Photo Materials Co, Kodak refused to sell the apparatus. In this case, Kodak had taken the advantage of market force of the upstream industry to control over the downstream industry. However, it is important to know that each company has the right for deciding on whether selling or not selling the product. For example, a company might refuse the deal because its partner damages the environment. So, not all refusals to deal cases are regarded as a barrier to competition. Firstly, We have to prove that the goal of refusal to deal is to dominate market. Secondly, that it has a chance for market domination. Thirdly, that this market domination finally brings about a market force enables to undertake supra competitive price or to set up a barrier to the next competitors.

The other strategy to control over market is **predatory pricing strategy** in which the company is ready for sustaining a temporary loss by marking down the price far lower than that of the competitors so that they might come into a bankruptcy. Due to that, this who undertakes this strategy could take over the market and fix the supra-competitive market by which it might settle **the loss leader price**.

Several considerations shall be taken into account before accusing any company of committing the above strategy:

First, we have to prove that the company has implemented the loss leader price. As long as it does not suffer a loss while marking down the price, it still undertakes the fair competition.

Second, while proven this who undertakes the loss leader price, the companies still have to be proven that it has a great chance for making the other competitors close down.

Third, while proven that the company might not cover the loss leader price but by using predatory pricing.

This strategy will not work out if the barrier to entrance is too weak. Newcomers might join the competition so that supra-competitive price fixing is out of question. However, some say that Antimonopoly Law shall disregard predatory pricing due to its tiny possibility and irrationality.

4.8. Empirical Study

The principle concepts of business competition, yet under discussion, imply the goodness of competition, by which all economic efficiency might improve. Furthermore, this condition might encourage all existing firms to compete fairly so that they might produce the cheaper and more qualified products, and satisfactory services.

Discussions on these concepts apprise that both government policy and economic factors could bring about certain market structures that finally affect business competition conduct in the market. This conduct then sends impacts on economic performance, such as the overall economic efficiency. For example, the market, in which there is only one company on which numerous consumers might rely, could fix the supra-competitive price.

This conceptual discussion has neglected one urgent question: have some empirical evidences supported its conclusion? The answer is that: it is necessary to build a common method of market structure and competition ratio estimation; to describe annually step-by-step change of market structure; to set up a common economic performance (such as efficiency ratio); and even to assert the impact of economic competition rate on overall economic performance.

To describe market structure and competition ratio, one usually uses CR4 (Four Firm Concentration ratio). One often hypothesizes that the stronger the concentration ratio, the more possibilities those firms own to collude to fix supra-competitive price. Trend in manufacturing industry concentration in Indonesia has indicated a delighting propensity. The average of CR4 in manufacturing industry dropped from 63,6% in 1975 into 51%in 1990, and finally ended in 51% in 1993 (Bird, 1999). Although the industrial concentration ratio in Indonesia is considerably high according to International Standard (Bird, 1999), the propensity to fall of concentration ratio implies the gradual improvement of market competition in Indonesia, at least in the manufacturing sector. This high concentration ratio normally happens to the developing countries in which the manufacturing market sector is still limited.

The weakness of CR4 for indicating competition ratio is that it disregards international infiltration (through export and import). In fact, the imported commodity has been competing tightly with the domestic one. While there prevail many imported commodities, the market can't fix the price higher than that of the imported commodity, although it has the high CR4, If it insists, the consumers might leave for other products. In other words, Import infiltration lessens the market force of big firms in domestic market. Bird (1999) asserted that if CR4, a long with import and export impact, is adjusted, the concentration ratio will be lower, from 46,9%in 1975 to 41,1% in 1993.

The other weakness for indicating competition ratio is that it only describes one-year competition ratio, thereby, it disregards competition ratio amongst biggest firms in the market. It might happen that market is only under control of a few of firms, but while the tight competition emerges in this condition, there would be a very little chance for price fixing. One of the accurate measures for competition is sales-turn over of all firms prevailing in the market. If the turnover is high, all firms getting involved in this market will thrive to dominate each other. Otherwise, while market control is relatively stable in a long period, the market competition ratio will be low. Table 1.2. points out that the average of industrial turnover ratio rose from 23% (1975-1980) to 34% (1989-1993), or that a delighting improvement in competition ratio amongst firms had finally happened.

The foregoing discussion has frequently mentioned that competition will speed up the overall economic efficiency and productivity. Table 1.2. indicates the positive relation of market instability rate (high turnover = high competition ratio) to the productivity improvement. So the industries sustaining the market instability escalation and the concentration ratio decline (more competitive), will have a significant rise of productivity ratio. Or otherwise, they will suffer the decline of productivity. But we have to recognize that the above symptom might not take place in every occasion. For example, The table shows that the 6 industries that sustain the concentration ratio escalation have the rising productivity. Otherwise, the 2 Industries that sustain the concentration ratio decline suffer the productivity slope. Anyway, Table 1 points out that the turnover of market has described more vividly the competition ratio in market and its impact on industry.

Table 1.2. The Relation of Competition Ratio to the Productivity in Manufacturing Sector (1975 -1993)

Concentrati on Ratio	Market Stability	Competition Rate	Number of Industri	Productivity increase
Turun	Turun	Naik	19	1.92 %
Naik	Naik	?	6	3.18%
Turun	Naik	?	2	- 1.15%
Naik	Naik	Naik	1	- 7.48%

Note:
Concentration ratio: measured with CR4 (the difference of the average of 1984-1993 and that of 1975 – 1983)
Market stability: measured with absolute index instability
* The difference of the average of overall productivity increase of 1984 – 1993 and that of 1975 – 1984
Source: Ascwicahyono (1999)

The first conclusion, this very short empirical study shows that the competition ratio in Indonesia at least in manufacturing sector indicates the significant decline of concentration ratio since 1975 and the rapid increase of market instability ratio. Both indicators imply the significant increase of competition ratio in manufacturing sector in Indonesia.

The second conclusion, the above discussion views that CR4 less qualified for measuring competition ratio, because it disregards the competition ratio of the imported product (commodity) and the market instability. Therefore, it is advisable to use more than one indicator to calculate competition ratio.

The third conclusion, competition sends a positive impact on economic performance improvement, at least, while by measuring the industrial productivity ratio.

II. Competition Law at Glance

I. Background of Competition Law

Several significant changes have occurred during the Indonesian reform, such as transformation in democracy, law order, and economy. The fact indicates that the long-term crisis caused by the wrong management of the new order government has encouraged this reform. The economic banking system, monetary policies, and foreign loans have brought out that crisis. The development of Indonesian economy, which is based on Demokrasi Ekonomi Pancasila, has come up with a new phenomenon and wondered us whether the government decided one-sided policy that beneficial to certain groups of business actor, or even had no willing to control the facility given to the business actors.

One of the modern economic principles is a fair business competition climate. This principle has been so long practiced in the developed countries that own the infrastructure of the related law. The used terms vary. The United States prefers **Antitrust Law**, while **Australia Fair Trade Practices Act**. This law commonly deals with business competition, the warning about violation against the law, its administrative punishment, civil and criminal case. This law has also introduced a commission or an independent board in charge of controlling, inspecting in case the business actors have broken the law. The law is to protect the consumers or the public from the cheating business actors, to create a common space for fair and pure competition, and to improve efficiency.

Poorly, Indonesia has embraced tightly **Ekonomi Pancasila**, which can't definitely guarantee the existence of the equal chance for open and fair competition? The fact has proved that some policies are theoretically done in behalf of the public interest and are practically benefited by certain protected businesses. Thereby, the sophisticated business competition law is really needed.

The Representatives of PDI fraction had ever proposed the issue to be discussed, but Indonesian Legislative Assembly refused the proposal. But finally this law comes into reality by March 1999. Some accuse that the IMF imposes this action though. Or it is to meet The Supplementary Memorandum IMF in the Letter of Intent and its other subordinate laws. This new law is known as Law on Ban of Monopoly Practices and Unfair Business Competition, which is enacted on 5 March 1999 and consists of 11 sections 53 Articles. This law is then recognized as Law Number 5 year 1999 and is going into effect by March 2000.

2. Need for Competition Law

Indonesian people, as a matter of fact, glorify harmony, cooperation, and mutual aid. Therefore they hardly accept the principle of competition or rivalry, as they are accustomed to living under the principle of the mentioned values. Although they are heterogeneous, we might still come across competition in their life. The profit-minded competition has inherently penetrated the soul of almost each business actor. It may appear in the form of price, quantity, services and other factors which consumers might take into account.

But as a matter of fact, the nowadays-Indonesian economy has been finally wrecked by the government's policies, which has not supported the public interest and has enlivened the bad business climate and unfair competition. Therefore, the existence of business competition law is hopefully able to create an equal chance for all business actors. The policies on competition have not been codified well. We find them in Law on Small-scale Business Number 9 Year 1995, Law Number 5 Year 1992 on Cooperative, Law on Industry Number 5 Year 1984, Law on Limited Company Number 1 Year 1995 and Law Number 8 Year 1999 on Consumer Protection.

There are three existing forces in Indonesian economy: private, government, and cooperative. The evidence points out that 70% of Indonesian economy is under control of certain groups of businessmen and big-scale business actor dominates 86% of National Output. Whereas the small-business sector, which dominates 94% of cultivation sector, only produces 9% of aggregate output. Cooperative sector then only contributes 3% to the national output, although it supports 80% of Indonesian people. Small-scale business owns 38 million units, which is 99,85 % of total units and total business fields available in Indonesia.   To the private or government business, capital, technology, and human resource aren't big deal.

Referring to above condition, the fair law is essentially needed to create an equal access for competition for all types of business scale.

The implementation of Law Number 5 Year 1999 will affect the market structure and evoke some possibilities in each business actor:

a. The powerful business actors will survive in market, those who are able to sustain efficiency and to compete soundly;
b. Some business actors concentrate and consequently, after getting involved in competition, weakly anticipate the market.
c. There will be a change in business sector, in which the business actors who weakly compete have to find out other chance for survival in market.
d. Some business actors fail to join the competition.

According to the above assumption, each business actor has to be ready for competition. Besides providing an equal chance for competition, the mentioned law enables business actor to apply efficiency and a way out to survive. Besides protecting business actors, this law guides them to practice the pure and sportive business.

So, hopefully, the competition will turns out to be such a mechanism that creates a perfect instrument for protecting consumers.

Through the fair competition, business actors might achieve efficient, effective, and well-qualified products of which consumers might take advantage in order to be able to choose the qualified product and to buy it with the competitive price.

3. Government's Participation in Competition

In order to protect public interest, the government has to implant a full-fledged understanding about the fair competition in business. The government has to create the right tool for promoting competition policies, as the the government is the authoritative institution for producing the law on competition.

In addition to providing the right tool, the state has to deal with the case having connection with business competition. KPPU is supposed to stand for the government, able to show the credibility and the integrity through processing legally the cases having relation with competition problem, which cause market distortion.

Sanction is considered the absolute state's authority and the urgent substance to the law. According to the business competition Law, administrative punishment shall be in the form of written warning, an announcement in any press until the day of business license revocation. The revocation happens while the business actor refuses to cooperate with KPPU and to comply with the law or while violating it. The civil and criminal sanction expectedly will be the effective instruments for stopping the violator's action. Imprisonment and penalty will be *ultimum remedium* for business action. Imprisonment shall refer to the law regulated by the Civil and criminal Code on Cheating Business Competition and Violation against Law. The substantial penalty will affect companies' performance and aware the business actor to practice virtuously.

But it's extremely necessary to watch the state's authority for control, because monopoly practice might happen due to the government's consent. There have been some evidences found concerning the government's policies that encourage monopoly practice and unfair competition, such as that:

a. The government does not control the facilities given to some business actor, and just let monopoly practice happen within them.
b. The government own such a big role in handing facilities to the business actors of BUMN (Government Business) that makes them likely to monopolize.
c. No vivid limitation on Natural Monopoly that the government is allowed to do. This deed (natural monopoly) is usually under the protection of the divinity of Article 33 UUD 45 (the constitution). And consequently, economic cost rises and is growing inefficient.

Monopoly originates from Greek means *single seller,* and theoretically, it means the facility bestowed to business actor or company to undertake trade, to make any product or to control all purchased commodity. The current monopoly differs from the model that the government tries to illustrate, which hopefully develops the fair competition within business actors.

The government might get wedged in monopoly while practicing natural monopoly if it doesn't perform it transparently. The goal of competition policy is to guard the sustainability of freedom of competition usually associated to freedom of trade, freedom of choice, and access to market. In connection with this, Chief Justice Warren Berger stated that the goal of the state is to guard the sustainability of competition, not only the competitors.

4. The urgency of competition law in modern economy

Competition is an essential element to be used in modern economy. But business actors are supposed to practice only the fair competition to earn their profit. For this, Competition Law, as code of conduct, hopefully directs the business actors to the fair and pure competition.

Encompassing this Global Era, Indonesia has ratified (signed) some important agreements, such as membership of WTO, APEC, AFTA and so on. Consequently, after joining WTO, which is ratified under Law Number 7 Year 1994 dated 2 November 1994, Indonesia has to work carefully on economic provision. To overcome this era, Indonesia has to employ the sustainable business actors that can survive in both domestic and international market. By launching the Law Number 5 Year 1999, Indonesian government has shown his good willing at international competition.

The principle of GATT/WTO to which Indonesia may refer is the principle of trade without discrimination. The above international provision will make Indonesians ready for competing with foreign products or domestic ones.

5. The Fudamental Substance of Competition Law

Antimonopoly Law is settled for controlling business actors to keep away from monopoly practice and for promoting the fair, pure and open competition climate. This law describes the banned and the allowed practices, as well as the sanction.

This law has a big concern in Cartel (combination of production, sale, price for monopolizing or restricting competition in industry or commodity, exclusive dealing (One of vertical integration types settled under contract in which buyer consents to buy all commodities from one seller), merger/ Company acquisition or vertical, price fixing (collaboration for within competitors to set market price), oligopoly (Only a few of Companies selling the identical product so that brings about a limited competition and a high price), Monopsony (single buyer that control the commodity), tying contract (The agreement between seller and buyer in which the buyer can buy the tying product on condition that he buy the tied too), market division/market allocation (The agreement between producers and sellers for dividing the market area in order to maximize the profit), Boycotts (engaging other person to break the contact with the third or other person.

The law regulates more profoundly than any other foreign laws and uses sanction as instrument for encompassing violation. The sanction is classified into administrative, civil, and criminal. Administrative sanction might be in the form of agreement cancel, cessation of activity suspected to practice unfairly, merger dismissal, penalty or fine significant to affect the violating company.

Meanwhile, the penal sanction is directed to the law-breaking business actors or the criminals. This kind of sanction varies, may be in the form of business license revocation, of ban on certain undertakings to handle particular job, of activity dismissal, and of damaging activity.

Penal sanction conveys a critical question, since KPPU, the new independent commission, owns no authority for giving penalty. Some wonder about the competency of KPPU in penalty, as penalty is a jurisdiction from court. The government shall soon anticipate this problem in order to promote the certainty of law.

This independent commission is similar to the existing commissions in other countries such as Fair Trade Commission in United States or Australian Competition and Consumers Protection in Australia. The commission functions as tool for law enforcement or control. To prove the independence, this commission employs several experts with a variety of backgrounds on condition that they have the basic knowledge on legal and economy. The pluralism of this commission is doubted to be able to produce a technical decision.

The candidates of commission member are proposed by president to have the approval of Indonesian Legislative Assembly. The commission owns both passive and pro-active roles. In the former role, the commission is waiting for the complaint from the public or the person who finds out any pervasive practice, whereas in the latter, the commission pro-actively surveys, searches for input, and investigates business actor to find the truth.

6. Competition Law in Some Countries

6. 1. Competition Law in United States

a. Background

The United State's Law Competition is commonly recognized as **Antitrust Law**. Formerly this law was to accommodate the right to compete. The premier law on business competition was **Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies** issued by the Congress 1890,and popularly called **Sherman Act**. This Act was finally reconstructed in 1914 by Act to Supplement Existing **Laws Against Unlawful Restraints and Monopolies** that was well known as **Clayton Act**. In the same year, this State also published Act to create a **Federal Trade Commission**, **To Define Its Powers And Duties, And For Other Purposes** that was then recognized as **Federal Trade Commission Act**. This Act had been put into effect up to 1936 and which did Robinson-Patman Act finally perfect. This action of perfecting was limited on 2 Articles of Clayton Act on price discrimination.

The United States engaged a lot the case law, instead of the above law, because this state usually depends on the system of Common Law. The case law is very useful to apprise varying restrictions of laws.

b. Substance of Restriction

Several American legislation and judicial decisions prohibit the businesses obstructing the commercial system. Those businesses might be operated by two or more business actors settling an agreement or by a single actor practicing monopoly.

Section 1 Sherman Act decides that any agreement obstructing trade and commerce is illegal and shall be worth refining and imprisoning while proven. So this law regulates a ban on monopoly and employs refinement and imprisonment.

Meanwhile Clayton Act prohibits practices impacting negatively on competition. There are four unlawful practices, price discrimination, tying and exclusive contracts, merger undertaken by a company, double/multiple posts of job. Those practices are regarded illegal as long as impacting on lessen competition or leading to monopoly. Whereas Robinson-Patman Act regulate more profoundly price discrimination cited in Section 2 Clayton Act.

The competition law of The United States prohibits some practices destroying competition system such as cartel, tacit collusion, joint-venture and combination of competitors, monopoly, monopoly trial, predatory pricing, vertical integration, tie-ins, reciprocity, exclusive dealing, vertical merger, Waralaba contract, resale price maintenance, vertical non price restraints, refusal to deal, horizontal merger, conglomeration merger, and price discrimination.

c. Law Enforcement

The United States' authoritative board for Law Competition Administration is Federal Trade Commission Act (FTC-AS). This commission under Federal Trade Commission Act shall interpret and apply competition law provisions such as Clayton Act, Robinson-Patman Act, and Unfair Trade Practices Act. FTC-AS composed of 5 members elected by President under the approval of Senate. This commission is in charge of taking action against the unfair competition, or even of collecting information, investigating any business actor suspected breaking law, forcing business actor, private person or legal person, to answer some inquiries. In addition to this commission, Department of Justice ha s also an authority for dealing with competition problem through the recommended division, Antitrust Division.

6.2. Japan's Competition Law

a. General Introduction

The main law concerning competition in Japan is **Law concerning the prohibition of private monopoly and preservation of fair trade**. This law is then commonly recognized as **Antimonopoly Law** (**Dokusen Kinishiho**).

Japan society, which respect collectivity and consensus, novices to competition law. Culturally they would rather work collectively and respect harmony instead of competition. They knew competition law since the occupation of Allied Forces leaded by The United States. Since then the Occupation Power was, aware conglomerates (**Zaibatsu**) supported that Japan aggression in 1942. Therefore, competition law was needed to destroy conglomeration, to de-concentrate the big-scale companies, and to dismiss the existing cartels before the outburst of the war.

The United States introduced competition law to Japan while occupying the country. Therefore Japan adopted a lot this kind of law from The Super Power. Since the enacting, there have been a lot of alterations in the law. And in 1952, The Antimonopoly Law of Japan turned to be an amendment that had caused the dismissal of some important provisions such as the law that regulates Cartel, **perse illegal**.

Formerly, this law was applied strictly, but then lessened as the time passed by. An observer form the United States says that Japan has halfheartedly applied this competition law instead of The United States.

b. Substance of Restriction

The law of competition in Japan prohibits private monopolization, Unreasonable restraint of trade, and unfair business practices. Private monopolization as referred to in Article 2 Paragraph (5) the antimonopoly law of Japan is while entrepreneur excludes or controls other businesses contrary to the public interest and restrictive to competition. While, unreasonable restraint of trade as referred to in Article 2 Paragraph (6) is business activities by which entrepreneurs mutually restrict, conduct activities to fix, maintain or enhance prices; to limit production, technologies, products, facilities, or consumers, or suppliers, thereby causing contrary to the public interest and restrictive to competition. Unfair business practices as referred to in Article 2 Paragraph (7) is any act obstructing fair competition, such as unduly discriminating against other entrepreneurs, coercing consumers to deal with one.

The following prohibition is projected on merger, acquisition, and holding company which cause concentration of market power, cartel, trade association restricting competition, boycott, exclusive dealing, resale price maintenance, dominant position abuse, contracts with foreigners.

c. Law Enforcement

To enforce the said law, Japan employs Fair Trade Commission (Japan's FTC). The existence of Japan's FTC coordinated in detail by Section VIII Antimonopoly Law of Japan. The commission is an independent administrative body that composed of one leader and four staffs elected by Prime Minister and under the approval of Parliament.

The authority of Japan's FTC is broken into three categories: administrative, quasi-legislative, and quasi-judicatory authority.

Discontented person to the decision of Japan's FTC might appeal the case to the Appellate Court Tokyo. This High Court possesses exclusive jurisdiction and is the first level court having concern in the decision of Japan's FTC.

6.3. Competition Law in European Union

a. General Description

European countries have their own competition laws. As these countries are going to integrate, there exists European union that is formerly called European Economic Community. The existence of European Union is based on Treaty on European Union that is commonly recognized as Maastricht Treaty, which was signed up on 7 February 1992 and has put into effect since 1 January 1994.

This law is called Competition Law in European Union, whereas Antitrust Law in the United States. Treaty on European Union, which is the man source of competition law in Europe, regulates competition to guarantee freedom of competition in European single market. Competition becomes the main subject of the third section entitled Policy of the Community Article I on Rules on Competition in which Article I regulates Rule applying to Undertakings composed of 5 articles. The more detail laws on competition are manifested in Provision, Notices, Directives, and Decisions.

b. Substance of Restriction

Article 85 and 86 Treaty on European Union regulates restriction against undertakings. Article 85 prohibits any anti-competition agreement influencing badly on the trade among Union members, obstructing, limiting, and distorting competition in common market. Whereas Article 86 regulates dominant position abuse committed by undertaking as long as it affects the trade among members. So the above both articles prohibits horizontal/vertical agreement, merger, joint venture and dominate position abuse. Horizontal agreement includes such as market sharing, price fixing agreement, and collective boycott. Meanwhile vertical agreement includes such as exclusive distribution and exclusive purchasing, agreement on resale price maintenance, and exclusive agencies. Merger is allowed, as long it does not lead to economic power concentration. The dominant position having relation with relevant product market, relevant geographical market, and domination are prohibited.

In contradiction to American Law, Social act in Europe, ruining the competition though, according to European Union Treaty, is allowed by **exemption** regulated by Article 85 Paragraph (3).

c. Law Enforcement

European Commission that is authorized to sue cases and to cope with violation against competition law supports competition Law in Europe. Therefore, this commission is also authorized to investigate but force companies provide the needed information. The commission is also authorized to apply refinement and make an interlude decision. It is the only board competent to issue negative clearance proposed by company in accordance with Article 85 Paragraph (1) European Treaty.

Directorate General IV, one of Commission Divisions, is in charge of competition policies within European Union Members. In the matter of Commission's decisions, they might be appealed in Court of Justice. Instead of the Commission, Court of Instance is a board in charge of coping with violation against competition law, particularly regarding the delicate cases on the government's fund and anti-dumping.

So through the above explanation, there might be concluded that the government is the only institution regulating business competition. The industrial countries absolutely need competition law to safeguard market mechanism so that market might not lead to monopoly practices or unfair competition.

Almost all countries own the identical substances of law. They commonly prohibit all agreements that might affect decreased competition, monopoly practice and dominant position abuse. From the experiences of the mentioned countries, we might conclude that an independent board is urgently needed to enforce competition law. Economic, accountant, and legal experts must do it professionally. However, to be an effective board, it essentially needs a supporting secretariat.

7. Competition Law in Indonesia

Disclosing law competition, which is one of law concerns, we have to relate it to Article 33 Constitution 1945 as its normative value to settle National Economic Policies. According to Article 33 Constitution 1945, the goal of economic development must be based on the people oriented democracy having respect with social justice for all Indonesian People. The Institution protects people's interest through prosperity approach by giving in to market mechanism. But the subordinate laws that regulate National Economy are settled to support this mechanism. Such as Sri Edi Swasono interprets a sentence of Article 33 Paragraph 1 Constitution 1945 " Economy is arranged…." As:

The word **organized** as referred to in Article 33 Paragraph 1 Constitution 1945 is imperative, so economy cannot independently develops or depends on its own economic power or free market force. The word implies structural development through real act of which the government is in charge.

Economic organization by laws is to create national economic structure in order to realize democratic economy based on Five Principles and The Constitution. It consists of such following characteristics:

a. Economy is organized as a common attempt based on familial basis;

b. The main branches of production important to the state and dominating public's interest shall be controlled by The government;

c. Earth, water, and its natural wealth that greatly support people's prosperity shall be controlled by The state and exploited for people's prosperity;

d. Source of wealth and state's finance might be exploited under the approval of Indonesia Legislative assembly and the control over the relating policies shall be also in the hand of Indonesia Legislative assembly;

e. Regional economy shall be developed in line and in equal within regions as united national economy by exploiting optimal regional potential and participation in order to realize the archipelago concept and national defense;

f. Each Citizen owns the freedom of choosing the expected job and owns the right for having job and humanely way of living;

g. Private proprietorship is admitted and its usage shall not against people's interest;

h. Potential, Initiative, and creativity of each citizens shall be wholly developed as long as not damaging common interest;

In addition, the arrangement is also to avoid such followings:.

a. Free fight Liberalism System that causes exploitation over human and other nation as it has, historically, caused and kept alive the setback of national economic structure and of Indonesian position in International economy;

b. Statism System in which the state, along with the apparatus of economic state, dominates, imposes, and breaks the potential, as well as the creativity of economic units out of the state's sector;

c. Unfair competition and economic power concentration on a certain group in the form of monopoly and monopsony that damage society and against the end goals of social justice.

GBHN (Broad Outlines of the Nation's Direction), which was programmed from year 1973 to 1999, has implicitly mentioned **embryos** of the government's endeavor that indicate the restriction towards monopoly practices and unfair business competition.

1. People's Consultative Council's (MPR) Decree Number IV/MPR/ 1973 on GBHN Division Economic Development:

6. "The endeavors of development output distribution has also to include some programs to provide more accesses for small/big-scale entrepreneurs to expand and improve their business. This, therefore, gives more responsibilities to the weak economic groups, by providing a chance for strengthening capital and improving their skill to maintain the enterprise and for marketing their products. In line with this, Cooperative, as an institution recruiting the weak economic forces, shall expand its role and capacity in all programs…."

2. MPR's Decree Number IV/MPR/ 1978 on GBHN Division Economic Development Sub-division Private Business and Weak Economic Groups.

   a. To improve more active public's participation in development, national private business sector has to be attentively expanded. In line with this purpose, It's necessary to promote a mutual collaboration between government, government's companies, private sector, and cooperative. The government shall create such a fair climate that supports the smooth running of business, such as business security and safety, simple procedure of permit and so forth.

3. MPR's Decree Number II/MPR/ 1983 on GBHN Division Economic Development Sub-division National Private Business and Weak Economic Groups.

   a. It's necessary to enliven national business in order to encourage public's participation. To realize this program, The government collaborates with the Chamber of Commerce and Industry (KADIN). The equal access for government's business, cooperative, and private business does help this program.

   b. The harmonious collaboration between big, middle and small-scale business, and cooperative must be enlivened, inspired with the spirit of cooperation. Thereby, It is crucial to make such a climate that assures the business and cooperation.

4. MPR's Decree Number II/MPR/ 1988 on GBHN Division Economic Development Sub-division National World of Business.

   a. National World of Business development that consists of government's business, cooperative, and private business is intended on enlivening economic growth, expanding evenly development and its output including business access and working field. Therefore, the capacity and national business participation especially cooperative, small-scale business, informal and traditional business shall be perpetually improved in order to be more firm and independent.

   b. The collaboration between government's business, cooperative and private business, and between big, middle and small-scale business shall be developed based on familial basis and mutual profitable cooperation. To expand national world of business, it's necessary to abolish economic power concentration such as corruptive monopoly.

5. MPR's Decree Number II/MPR/ 1993 GBHN Division Economic Development Sub-division National Business.

   The development and governing of National Business that cover cooperative, government's business, and private business shall be motivated to be the main motor for economic development, to develop economic growth through even distribution of its output, and to expand business access and job opportunity so as to realize the firm and independent national economy. Therefore, it's necessary to encourage the expanded cooperation and the inter-sector and inter-sub-sector relationship, and the relationship between big, middle and small-scale businesses that depend on mutual and profitable cooperation based on familial basis and togetherness.

6. MPR's Decree Number II/MPR/ 1998 on GBHN Division Economic Development Sub-division National Business.

   a. To expand and govern fair and transparent national business, it's necessary to abolish economic resources domination and economic power concentration on certain group, social group and private person, such as monopoly, monopsony or other sorts of market. It is realized in the mutual, firm, profitable cooperation between small, middle, big-scale business, and between cooperative, government's business and private business. The developed and developing business shall patronize the undeveloped business in order to create a firm and sophisticated national business structure. So, it's important to make a sound competition climate to motivate this partnership.

7. MPR's Decree Number IV/MPR/ 1999 on GBHN General Condition concerning:

To overcome economic crisis and its impact, the government has reformed the economy, but the result is not enough satisfactory because (1) economic development has, so far, been concentrated in single power and much interfered by the government so that economic authority is not in people's hand and market mechanism doesn't work effectively. (2) Economic gaps between central and regional, inter-regional, inter-personal and among economic classes have prevailed in all aspects of life, as a consequence, economic structure weakens as monopoly grows, and economic power concentration is centralized in the hand certain small social group and certain region.

Section III, Vision and Mission, point (7): To empower people and all national economic power particularly small, middle-scale business and cooperative through developing people oriented economy system based on fair market mechanism that relies on natural resources and productive, independent, progressive, ambitious, wide-perspective, firm human resources.

Section IV, Policy Directions B. Economy point (1) To develop people oriented economy that is based on fair market mechanism, fair competition principles, and respects economic growth, fairness values, social interest, life quality, development, environment oriented so that business access and job opportunities, consumer's right protection, and fair treatment to all people will be guaranteed. Point (2) To elaborate fair competition and to diminish monopolistic, distorting, and corruptive market structure. Point (3) To optimize government's partaking in evaluating market's handicap through abolishing troublesome barriers of market mechanism, such as by provision, public services, subsidy and incentive that are bestowed transparently and under the laws. Point (11) To activate small, middle-scale business and cooperative so that turn to be efficient, productive, competitive that might create a good business climate and extended business access. The government will selectively hand in facilities in the form of protection against unfair competition, education and training, business and technology information, capitalization, and business location.

GBHN concerning economic development form 1973 to 1999 has allowed the access for economic businesses to grow and develop but turn out to be gigantic, as we commonly know as conglomerates. But it does not allow monopoly practices and unfair business competition as it also regulates the restrictions of monopoly practices in case these practices happen.

Kwik Kian Gie has clarified the criteria of the permitted monopolies according to GBHN:

1. Monopoly authorized to the invention, such as sole agency and manufacturer and patent, in order to grant incentive the creative and innovative idea;

2. Monopoly authorized by the government to BUMN (state-owned corporation), as the products cover all people interest , such as electricity, transport (Garuda Indonesia), communication (Telkom), etc;

3. Monopoly authorized to private enterprise with the government's credit;

4. Monopoly and monopolistic position naturally obtained as the monopolist wins in fair competition. The entry (of other same investment) shall be welcomed.

5. Monopoly or monopolistic position naturally obtained because of excessive investment, consequently, only one surviving investor can afford it. But still, the government has to deal with monopoly persuasively and carefully;

6. Monopoly or monopolistic position taking place due to offensive cartel establishment;

7. Monopoly or monopolistic position taking place due to defensive cartel establishment;

8. Monopoly authorized to certain organization to provide the fund for the foundation that will be benefited for special purposes such as social activity and so on.

Meanwhile, according to GBHN, monopolies regarded against the public interest are while:

1. Monopoly authorized to one or more private enterprises without any subordinate law;

2. Monopoly or monopolistic position obtained from the collaboration between two or more typical organizations either in the form of exclusive competition provision or of fusion.

According to Kwik Kian Gie's opinion, the above monopolies took place because government is partaking in conditioning the monopoly in certain businesses, such as government business, private business and cooperative.

Meanwhile, Ginanjar Kartasasmita launches the different idea on the state's position relating to its functions that contain 4 strategic functions. The discussion will relate the state's functions to monopoly practices and unfair business competition. They are:

1. Fair Law Enforcement. The legal fairness will provide as basis for economic

2. Fairness or as precondition for the process of fair economic activity.

3. Fair business conception. Supposing that market is a mechanism that organizes economic life, so, with no fair competition climate, unfair access to get involved in economic life might emerge.

4. Redistribution. With the open access only, prosperity distribution is till not well guaranteed. In this free era, the distribution must enforce grass-rooted economy in order to be competent to compete and to access.

5. People basic need fulfillment.

Sritua Arief doubts the third and fourth state's functions. To him, considering their characteristics, those two give in access to monopoly and oligopoly. Private sector expansion undeniably brings about economic concentration by some groups of business through inter-corporate investment expansion that finally turn into conglomerates. This economic concentration, in the long term, will impact badly on social, economic, and political life about which public probably complains. We can't just let this condition pass by.

According to Ahmad Fuad Afdal, the above three opinions are true, that Indonesian conglomeration is strongly related to social-political context, particularly to government's policy. Conglomeration existence depends on business access conceived by the government because of political stability.

Our Constitution is not **anti-gigantic,** private business sectors, government's businesses, and cooperatives are allowed to grow being conglomerates as long as their processes are in accordance with the existing norms and business code.

Recently, Indonesian economic condition has rapidly developed; some private businesses have dominated from the up-stream to the down-stream industry with no significant rival. Therefore, it is not an extraordinary thing for the government to settle the provisions that provide facilities for certain groups or private person. Therefore, the government neglects the principles of social fairness and even distribution and merely concerns about one's interest or private person's interest.

8. Reason of enacting Law Number 5 Year 1999.

The mentioned Conditions, as well as International economic Condition, had triggered the rupture of the Indonesian economic pillars. Monetary Crises initiated Indonesian economic crisis that achieves the peak in 1997-1998. Finally, Indonesian Government had to be assisted by the International world to reconstruct the economic condition. And President Soeharto had to sign up the note of understanding (nota kesepahaman) with IMF containing 50 items of reform memorandum and Indonesian economic restructure.

Those 50 items can be reduced into 10 divisions. First, Fiscal. Second, monetary and foreign exchange policy. Third, banking restructure. Fourth, Reinforcement of law apparatus and banking control. Fifth, International trade. Sixth, investment. Seventh, deprovision. Eighth, privatizing. Ninth, reinforcement of State social condition. Tenth, environment. To follow up this memorandum, Indonesia applies deprovision policies that cover 7 Presidential Decree (Keppres), 3 Government's Decisions, and Six President's Instructions. Some of the contents have brought about significant impact. This situation is parallel to what IMF's willing to erase all monopoly by certain groups or private sectors in Indonesia.

Such President's Decisions are Keppres No 20 tahun 1998 on revocation of privilege facilities formerly given to National Automobile Project. Keppres No 15 tahun 1998 on revocation of Bulog's Monopoly, rice for the exception and Keppres No 21 tahun 1998 on BPPC dismissal.

While Habibie was holding the presidential position, there were two decrees directly influencing economic reform and structure. They are MPR RI's decree Number X/MPR/1998 and are MPR RI's decree Number XVI/MPR/1998. The former concerns about the Subjects of Development Reform for National Living Safety and Normalization as State's Direction. Section II General Condition Division A. Economy mentions:

Development output achieved during 32 years (new order) has finally fallen into a spreading sadden decline, due to monetary crises by mid 1997. The strong economic base cannot resist those external financial crisis, and macro and micro difficulties.

The above condition turns up as national economy does not fully refer to the recommendation of Article 33 the constitution, but is likely to be monopolistic. The entrepreneurs closely related to the elite could get special priorities that lead to social gap. This fundamental handicap is caused also by the neglect of people oriented economy that based on natural and human resources basis as comparative and competitive preference. The appearance of conglomeration and certain groups of solid business, while not supported with the spirit of genuine entrepreneurship, will bring about the weak economic defense.

While the latter is on economic policy concerning economic democracy, gives development signals for new Indonesia, such as by prohibiting monopoly through Article 2,5,6 and 7:

Article 2:
The national economic policy is intended on creating national economic structure to realize the strong and immense middle entrepreneurs, the mutual relationship and partnership within economic actors that cover small, middle-scale businesses and cooperative, big private businesses, and BUMN. Those economic actors collaborate to realize democratic economy and highly competitive national efficiency.

Article 5:
Small, middle-scale businesses, and cooperative, as main pillars for national economy, shall get priorities, support, protection, and shall be expanded as large as possible as realization of people oriented economy without underestimating big-scale business' and BUMN's participation.

Article 6:

Big-scale business and BUMN have the right to undertake any business, maintain natural resources in fair way, and patronize with small, middle-scale business and cooperative.

Article 7:
1. The cultivation and usage of soil and other resources shall be fairly undertaken, by abolishing all sorts of power and proprietorship concentration in order to develop small, middle-scale business, cooperative, and all existing people.

To follow up the above decrees, the government has made the subordinate provisions such as laws and other technical provisions. The very demanded follow-up is to create the laws concerning monopoly practices and business competition. Some old laws have concerned about the corruptive competition, such as article 1365 KUH Perdata (Civil Code), Article 382 Annex KUH Pidana (Criminal Code), and Industrial Law.

DPR RI (Indonesian Legislative Assembly) proposed, for the first time, the draft of statute on monopoly practice and unfair business competition that then ratified by March 1999. The law is intended on safeguarding public interest and promoting national economic efficiency, restricting monopoly practice and unfair business competition, advancing people's prosperity, and creating sound business climate. Hopefully after running this law, competition condition grows well as well as International Contract signed by Indonesian government.

The principle contents of the contract (agreement) are that the business actors do their business in accordance with the principle of democratic economy and that they have to determine the balance between their own interest and public interest. The characteristics of economic systems, according to Pancasila, are:

a. Humane economic system;
b. Fighting for the economy that based on familial basis and cooperative;
c. Government's domination far from statism;
d. Controllable private sector expansion

9. Overview of the Law Number 5/1999

Law Number 5 Year 1999 on monopoly practice and unfair business competition consists of 11 section and 53 articles, they are:

Section I	: General Provision
Section II	: Principle and Goal
Section III	: Prohibited Agreement
Section IV	: Prohibited Activity
Section V	: Dominant Position
Section VI	: Commission for Business Competition Supervisory
Section VII	: Casework Procedure
Section VIII	: Sanction
Section IX	: Other Provisions
Section X	: Conferment Provision
Section XI	: Closing Provision

Section I contains 1 article concerning general provision composed of definitions and terms used in the law. They are monopoly, monopoly practice, economic power concentration, dominant position, business actor, unfair business competition, agreement, conspiracy or business conspiracy, market, related market, market structure, market attitude, market segment, market price, consumer, good, service, Commission for Business Competition Supervisory, and state court.

Section II contains 2 articles concerning Principle and Goal of the law
Section III on prohibited agreement (contract), composed of 10 divisions and 13 articles, they are oligopoly, price-fixing, area distribution, boycott, cartel, trust, oligopsony, vertical integration, exclusive agreement, agreement with foreigner. Section IV on prohibited activity, composed of 4 divisions and 8 articles, they are monopoly, monopsony, market domination and conspiracy. Section V on dominant position, composed of 4 divisions and 5 articles, they are general section, multi-post, stockholding, combination, amalgamation, and acquisition. Section VI on Commission for Business Competition Supervisory, composed of 5 divisions and 8 articles, they are status, membership, membership prerequisites, duty, authority and funding. Section VII on casework procedure, composed of 9 articles, they are report acceptance, prelude investigation, sequel investigation, investigation towards business actor and evidences, period of investigation, commission's decision and its weight, and legal remedy. Section VIII on sanction, composed of 3 divisions and 3 articles, they are administrative action, capital punishment, additional punishment. Section IX on other provisions, composed of 2 articles concerning the exemption by this law and monopoly done by BUMN. Section X on conferment provision enacts that business actor shall adapt to the law during 6 month starting from the first effective day of the law. Section XI on closing provision declares that the first effective day of the law is 5 March 2000.

10. The Future of Competition Law in Indonesia

There has been a long time that Indonesia needs anti-monopoly law. The appearance of UU No. 5 1999 that concern about the ban on monopoly practice and unfair business competition hopefully create a fair, pure business climate free from corruption, collusion, and nepotism (KKN).
We have to take care carefully and be reasonable whether the decisions of the law applicable in the future. Based on the empirical study and repetitious experience, most of Indonesian laws are well conceived, but are not enough adroit for the upholding and uncertain barrier. UU No. 28 tahun 1999 on Corruption Abolishment, UU No 23 tahun 1997 on Environmental Maintenance, and UU No. 14 tahun 1992 on traffics and public transport are the vivid sample for the less readiness/failure of the upholding.

To measure the prospect of the law perfectly, we have to comprehend the adequate theoretical framework. Radbruch at least has mentioned three main prerequisites to determine whether the law provision is qualified, philosophically bringing about justice, sociologically beneficial, and creating the certainty of law. Since the way of Radbruch's thinking is completely comprehensive, might be then used to predict the law prospect.

The dispute is still around whether UU No. 5/1999 can guarantee justice, benefit, and certainty of the law for business actor, consumer, and all Indonesian people. There are some subjects to be concerned while forecasting the prospect of this law. The process of UU No. 5 1999 conception is unique instead of the others. Therefore, this is the first application of DPR's constitutional right. The publish of this law is implicitly desired by all public (if we believe that DPR represent us) to coordinate Indonesia economic systems that are unsound and prevail sporadically. The law came up because of the foreign interference, instead of DPR's response to the public demand, in the form of Letter of Intent in which IMF and our government signed in 15 January 1998. One of the prerequisites to accomplish in order to get the fund is establishing competition law. Thereby, some doubt whether the law originates from the people's will or IMF's.

Now let us focus our discussion on the presence of competition law as a tool of social control and a tool of social engineering. Pound said that, as a tool of social engineering, the law has to protect three basic interests, public interest, social interest and individual interest. Hereby, Radbruch's and Pound's idea shall be used to estimate the prospect of the socialized competition law. To Pound, the goal of this law completely answers his ideal wish. That the law, as a tool of social control has to protect public interest and to prevent from monopoly practices and unfair business competition. Meanwhile, as a tool of social engineering, has to promote national economic efficiency, realize the full-fledged climate through practicing the fair business competition, and to effective and efficient business activity.

Indeed, if this very ideal goal can be realized, the law will give positive impacts on business climate development in Indonesia that was formerly too far from ideality. At least, this law will force business actor to manage efficiently his business, as the law guarantees and provides a great access to other business actors (as a consequence of monopoly practice prohibition through creating barrier to entry). So, only the efficient business actors will survive in market.

The other positive impacts of UU No. 5 1999 is that market is not distorted so that business access grows greater for undertakings. In fact, this condition forces undertakings to be innovative producing and purchasing their product (services and goods), as consumers will chose only the qualified product. So, the law, indirectly, helps consumers to find the qualified product, the competitive price, and the good service.

This law is not a menacing rule at all to the enterprises that are established before the enacting of the law as long as they don't commit the practices regulated in **the prohibited agreement** and **the prohibited activity** as well as in **dominant position.**

Instead of restricting undertaking's attitude, the mentioned law also restrains the government from giving privileges and facilities to certain undertakings, as having been done in Soeharto's era. The business administration implemented on clove, orange, nutmeg, cendana wood, rattan, and national automobile project is a vivid and appropriate sample for indicating the former policy that restrains the competition.

The above discrimination shouldn't have happened, if the Indonesian undertakings learnt from the other countries' experiences. The negative impact of monopoly practice might be caught from the classical case Darcy v. Allein in which the Queen Elisabeth I bestowed monopoly right to her husband to import playing card to English. Once in a while, someone called Allein, a designer, made another type of card. In response to this action, Darcy objected and sued Allein before the court, as according to him, Allein intruded his monopoly right. The court refused to prosecute Allein and sued Darcy for damaging competition so that other peoples can not do some businesses and the public sustains a loss due to highly priced and unqualified playing card.

Darcy v. Allein case, which happened in 1602, shall be an appropriate sample for the New Order Government that always issued monopolistic policies and provisions. As we know, The new order Government's policies had impacted badly on competition climate that brought about a total loss in public society.

Thereby, the presence of UU No. 5 1999 is expected to make the government objectively and professionally coordinate the Indonesian business competition. In addition, This law might promote the International societies' trust in Indonesia so that they begin to implant some capitals in Indonesia.

Based on that simple analysis, we conclude that the law will make undertakings do their business properly and create an efficient business climate. As a consequence, consumers get the cheap qualified products and services, as proposed by Welfare State Concept.
Social engineering, in this case, is reasonable for using a law as its tool. However, we have to determine the external and internal factors of the mentioned law. Otherwise, many disappointing outputs and damaging effects might occur. Therefore, to study the prospect of UU No. 5 1999, we should refer to Freidman's idea on three aspects of the law system.

11. Criticism on UU No. 5/1999

The nativity of this law has come up with a controversy in whether DPR might use its initiative right. On the other hand, there emerge IMF's pressure towards the government and the draft of statute conceived by Deperindag. This condition sends an impression of hastiness in enacting the law.

The above realities must be carefully observed to estimate the prospect of this law. In line with this goal, Myrdal in 1970 reminded that most of developing countries (soft states) had created the handicap laws. His research done in South Asia asserted that the less discipline societies produced **the sweeping legislation** (the hurried law), the less prospective law.

Referring to the enacting and the substance of UU No. 5 1999, it might be categorized as sweeping legislation. It happened as the materials of this law accommodating two compromised interests.

According to Friedman's analysis, which questions the influence of the structure, substance, and legal culture, the above law had rather support certain groups of business instead of people's interest. Thereby, the sudden will to enact UU No. 5 1999 should be doubted, as the political will of implementing the law was waiting for KPPU, which is authoritative and independent.

From the side of its substance, UU No. 5 1999 contains several **loopholes** that might be manipulated by undertakings and legal practitioners. The vivid sample of the mentioned provision is the rubber article that is unclear or shall be further precisely interpreted. In other words, The rule of reason must be employed to determine the real meaning.

To clarify the above statement, let's point out some terms that are not clear in meaning. They are such as monopoly, unfair business competition, market segment and other terms. Article 17 (2), for example, prohibits the domination over production and/or good and service marketing while causing monopoly practices and/or certain business actors/groups dominate market segment on one or more products/services higher than 50%.

While observing the structure of the above article, there appears a further deep question on how to decide whether a business actor has dominated 50% of market segment, whether the market segment shall be measured nationally or regionally, and whether a business actor has practiced unfair business competition? And other further questions. As the substance of this law prefer to use the rule of reason than per se illegal, the law has not completely responded to the existing monopoly practices.

From the point of view of fairness, as preconditioned by Radbruch, the substance of competition law could evoke the sense of fairness of certain undertakings, as the law bestows the privilege to BUMN. This exception is technically acceptable, as it is a kind of natural monopoly practice. The problem emerged as many enterprises had manipulated their monopoly right so that the action consequently impacts badly on each consumer and transgresses one of ideal goals the law outlined by Radbruch. PT Telkom and PLN are perfect samples of this kind of monopoly that makes consumers sustain a loss in the form of bad quality and high price and restricts the access of public to control those BUMNs.

To clarify the above samples, we might look into the government's policy on the international call maintenance that was given to one of BUMNs, PT. Indosat. The competition climate soon came up as PT Satelindo given the access to the business. As a consequence, consumers might get the lower prices and more qualified services. Australian telecommunication companies had achieved the same condition. Local, Interstate, and International call which had been formerly monopolized by government's companies were then given in to private companies such as Optus, Globe Talk and AAPT, and as a consequence, the international call tariff turned cheaper.

The above sample is the best teacher for proving that the government's monopoly might affect badly on consumers also. So, the privilege right bestowed to BUMN should be further observed so that this government company might not manipulate this right and consumers would not sustain a loss, and finally, the ideal goal of Article 3 UU No.5 1999 might be achieved.

The next substance that should be observed to estimate the prospect of UU No. 5 1999 is the law on KPPU as regulated in from article 30 to 37. This action is necessarily undertaken, as KPPU is an innovation to the Indonesian laws and acts as the most enforcing commission for the mentioned law. Just to remind us, that the unenforceable laws mean dead legislation.

Therefore, KPPU's existence is urgently needed to enforce the above law. However, before predicting the law's future, it is important to observe some factors involved in enforcing this law. The most influential factor on the law enforcement, instead of the substances of law, is the government's political will, professionalization, an independent law enforcer (in this case, KPPU), and public legal culture.

We admit that the competition law enforcement depends on the government's political will, as Parsons theoretically states that the political sub-system has the stronger energy than the law itself. Therefore the government determines the success of the competition law enforcement.

Realizing the above condition, a good governance is a must to implement this competition law, since the government is the authoritative for executing the law, but from KPPU election to the performance control. Good governance does not only affect KPPU performance but other legal institutions' also. Remember that KPPU's decree is not the final decision, it might be appealed to the District Court. SO, KPPU's professionality must be supported by the good system of jurisdiction that goes accordingly with public interest so that it becomes independent, professional, and free from corruption, collusion and nepotism. Some countries' experiences have indicated vividly that government takes greatly part in undertaking UU No. 5 1999.

Indonesian government is expected to show their strong commitments to implement that law so that business climate grows well. Otherwise, the very compromising Indonesian legal culture diminishes the fair competition system.

Now, to analyze profoundly the central position of KPPU, let us take Federal Trade Commission (FTC) of the United States as a sample. In his lecture, Prof. Stephen Calkins said that most of cases brought by FTC to the court had failed, although FTC's members were professional, highly-qualified skilled, and morally good, in fact, the American competition law had begun since 1890 (the enacting of Sherman Act). Notice that the American legal culture had supported the implementation of the competition law also.

Therefore, to conceive the firm KPPU, the generator of UU No. 5 1999, the government has to elect transparently the members of KPPU so that the commission might be the one on whom justice seekers might depend. Now comes the time to formulate the good KPPU's structure so that we might produce the affordable law. Hopefully we don't take after what India has suffered.

This law is expected to provide business facilities and its access, to restrict market from any distortion, to encourage a fair business climate, to motivate undertakings to bring about some innovations. Even, this law will grant the more qualified products and services that might be reached by consumers.

The substance of the mentioned law shall still be perfected, particularly to erase or clarify the rubber articles. Otherwise, it is difficult to be free from monopoly practices and unfair business competition. That the law is not a menace at all to the big undertakings as long as they do not commit the prohibited acts, do not hold any prohibited contract/agreement, and don't use their dominant position to ruin business climate.

The performance and independence of KPPU and the clean jurisdiction will determine the prospect of UU No. 5 1999. So, good governance is inevitably needed to support the implementation of the law. If the amelioration isn't done, the functions of the law never match the concept.

III.1. PER SE ILLEGAL AND RULE OF REASON IN COMPETITION LAW

1.1 Introduction

Competition law has divided the prohibited action into per se illegal and rule of reason. Shall anybody be punished without verifying that he has committed the action devastating competition? On the other hand, shall the authentication, on whether an action damaging competition, be done although costs expensive, spends a long period, and is complicated? This question comes up since the provision contained in competition law gives the judges a freedom to determine whether someone has broken the law due to restricting the trade. This provision as mentioned in Article 1 Sherman Act states that: " all contracts, combination in the form of trust or alike, or conspiracy, to restrict any commercial or trading activity amongst states, or with foreign country, is hereby breaking the law." Due to this provision, American Federal Judge takes three contradictory analyses to determine the validity of the horizontal agreement mentioned in Article 1 Sherman Act.

First, distinguishing the contract that directly restricts trading and therefore violates law from the one that indirectly restricts trading and therefore is admitted legal. Second, trade barrier to support the legal goal and that is needed to achieve the goal is admittedly legal and otherwise is violation against the law. Third, the encouraging actions and the restrictive actions to competition. Those three analyses enable to see the consequences of trade barrier or competition rending.

If the appliance of Article 1 Sherman Act disregards these consequences, this prohibition categorized as per se illegal (per se rule, per se violation). This action has its own reason for doing so. The positive aspect of applying per se rule is that it is a strict prohibition that guarantees and keeps undertakings away from being legally counterattacked and multiple losses. In addition, per se test restricts everything ruining competition. Thus, per se rules warn corporations about the prohibited actions and skip them from violation.

However, while firm or somebody is refined or sentenced dues to an unclear accusation, the principle of fairness and aptness can be shaky. In line with this case, Gellhorn, James, Pogue and Sims state that the endeavors to apply competition law is extremely complicated, due to the concentration on specified fact or the importance of economic analyses. There are some arguments or conclusion on this matter, but only a few of methodologies for dealing with the above problem.

These next passages are going to discuss on the terminology of per se illegal and rule of reason, the evolution of standard usage in cartel, and the tool of determining per se illegal and rule of reason. However, they are also going to talk about the relation between per se illegal and rule of reason, economic determinants on rule of reason and the actions that are categorized as per se illegal and rule of reason.

2.1. Terminology of Per Se Illegal and Rule of Reason

The word per se originates from Latin that means by itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation. If the purpose of an activity is certain and has damaging impulse, judge needs not to make a problem of its reasonability of the same phenomenon (with the phenomenon that is in the process of judgment) to determine whether the related phenomenon has broken the law. This principle is commonly known as per se doctrine. Per se illegal, commonly called per se violation, according to competition law, is a term that means that certain types of contract, such as horizontal price fixing, are regarded anti-competitive and public degrading without the need of authentication.

Rule of reason is the opposite of per se illegal. Under rule of reason, to assure that the action has violated competition law; inquisitor has to take the surroundings into account to determine whether the action has restricted competition improperly. Thereby, prosecutor should point out the factual loss and the immediate consequences of anti-competitive, not only the matter of unfairness or law violation. Kaplan has formulated one of the principles of per se illegal, that trade barrier is regarded as illegal per se if it is inherently anti-competitive, has no benefit, and is restricting or obliterating competition.

Moreover, if a barrier is categorized as illegal per se, the impropriety and unfairness of trade barrier have been conclusively assumed without authentication. But if the action is regarded as, illegal per se based on per se doctrine, the propriety and impropriety of trade barrier (including its validity) determined by rule of reason. According to rule of reason, propriety and validity of trade barrier is determined by appropriateness based on the principle of law and the duty to apply and to undertake public interest included in the laws.

2. 3. Evolution of Standard Usage in Cartel

While competitors are allowed to cooperate and consolidate market force, public will never get the benefits of competition. This assumption underlies the competition law settlement. An agreement to limit total production and mark up the price higher than competition price will directly diminish competition. This presumption has been welcome and applied in courts. In addition, an analysis on cartel has also indicated that any cheating or corruption exists in market need the specific provisions to regulate. A good collaboration in research, production or marketing coordination might also reduce the cost and improve competition.

Indeed, we might comprehend whether an action cannot be accused of against law or shall be verified before court that it is economically damaging or brings about some bad consequences. Therefore, to clarify matter, we will look into economic aspect of price and transaction cost by cartel.

Cartel is commonly caught as an agreement to control production and marketing of certain product. The idea of holding cartel appears in perfect competition model. This kind of market make consumer's interest control competition performance and producers responds to consumer's interest by producing the consumer's demand with the cheap price. Hence, there happens an efficient market in which sellers freely control the total commodity and its distribution so that consumers and sellers' position grows strong. Consequently, social prosperity advances maximally as production resources usage preferred, product quantity, and its quality maximized. This condition can be realized under certain assumptions.

While demand curve declines, as the product increases, consumers will pay cheaper and otherwise, a monopolist might increase his earning by reducing the sold products in market and raising their price. Due to this condition, to augment their profit, competitors and speculators will perform the same action collaboratively. They agree to limit the product so that the marginal product will not produce any profit. If this planning comes to reality, consumers will lose the competitive market in which they might find the qualified product and cheaper price. Nevertheless, sometime, producers fail to collaborate so that marginal profit equals to marginal cost. This phenomenon implies that they are aware of having committed something against the laws. Actually, a few of undertakings comply with the current law. Therefore, some still clandestinely do something against the laws.

Stigler has appraised the difficulties of coordinating cartel. First, Each cartel member has to approve of all collaborative decisions. This precondition is surely difficult to fulfill, as each side has to determine what product shall be made, mean while each member worries about how to use the product quality and provide it in his particular way. Moreover, each cartel member should determine what product shall be produced and how much its price. Under this circumstance, the published firm worries in case the new producers join in the same industry. To keep cartel alive, it's necessary to set up a trade barrier to newcomers or to accept the as new cartel members. The second choice forces cartel members to get fewer market segments or otherwise, the input increases and then causes the price decline.

After having determined the aggregate products and prices, a cartel has to distribute the quota to each member. In this situation, each member could get his own cost and market segment. The developing firm expects to get their future market segment increased, whereas the contra-productive one strives to hold a contract so that the market segment is well sustained. The consensus sometime is hardly to carry through.

While the above goals are gained, there comes another difficulty, each member has to persist in overcoming those who try to give him any incentive (to bribe) in order to transgress the recommended limit. Once each consents to determine the price higher than the marginal cost, each then is likely to corrupt/ overstep the contract. The contract impacts on member's depravity, vice versa. The discontented member tries to come across a chance clandestinely to break the contract. As a consequence, this action disintegrates the cartel.

Hence, the hardship of holding a firm cartel causes the difficulty of verifying its existence. Therefore, prosecutors and business supervisors bear the hard authentication. Based on this condition, price fixing is categorized as per se illegal. On the other hand, while price fixing fails, competition is well preserved as well as economy. So, shall price fixing be included in per se illegal? Isn't it appropriate decision?

However, in some cases, cartel is considerably profitable. Gellhorn and Kovacic state that cartel might protect certain industry from devastating competition. So, it's necessary to preserve it, particularly, so as to keep the fixed price in order to get the biggest percentage of all total cost (such as Railway Company). While free from competition pressure, company could expend for the desired innovation and do the research, and keep the product quality.

However, the above advantage is still on debate, as it is wondered whether the market can appraise the cost and the value of certain activity. Will someone hold a research on the disadvantage product in market? In addition, while consumers are not interested in buying, supporting the quality, should group of industries determine the minimum standard of quality? Government's interference in safeguarding industries implies that market is not capable of dealing with all interest. Thus, this condition underlies the prohibition of holding cartel.

Some collaboration among firms do not cause product limitation and price rise. Now and then, firms collaborate partially to establish any union and new firm or to gain certain goal. A contract by non-competitors can bring about organization that is more efficient. However, that collaboration expects the new firm or organization to take part. Ronald Coase, as quoted by Gellhorn and Kovacic, stated that the difference among single transaction contract, organization or firm, and market structure in which the foregoing two factors are under operation, is not clear. So, it indicates the unity of organization method.

Referring to the above statement, economic transaction cost is developed. Economists point out that besides coping with technical production, firms shall reduce organization cost and economic activity maintenance. In order to reduce the cost, or otherwise, to advance the economic activity of the organization, firms change into either a smaller or a bigger form, or collaborate. Hereby, we might see that economic transaction cost greatly impacts on competition. Through the above explanation, we still cannot find out clearly the organization structure of firms or within firms. Competition hardly foresees the goals and consequences of that collaboration and determines whether the advantage is much higher than the risk of competition.

Through the economy of cartel and the transaction cost, we conclude that settling certain common provision on collaboration among competitors is dangerous. In the case of Arizona v. Maricopa County Medical Soci 1982 in the United States, Some modern Supreme Courts refused horizontal collaboration (as being accused of violating law as referred to in Section 1 Sherman Act) in which the efficiency standard is quite substantial.

2.4. Tool of Determining Per se Illegal or Rule of Reason

Nowadays law competition commonly has specified the acts into per se illegal and rule of reason. The problem is: "Is this a fixed price? The fact tells that the certainty of law has always the difficulty with the justice, due to the development of trade and expertise.

Most of competition laws declare price fixing as per se illegal. Will any legitimization rise to erase that guilty? In line with this matter, Areeda and Kaplow tried to describe the scope of per se illegal. While X is determined as per se illegal, public must have frequently determined that the accused act in certain case is included in X category. There might appear those three problems then. First, the predefinition of X might be uncertain, vague or both mentioned characteristics. Second, while it seems certain, X category is still hardly applied on certain case before being examined by judge. Third, an action that is seemly in accordance with X category might against the law, but the court doubts to deal with it as no court has ever dealt with such problem and the case is regarded as risky. In such condition, Judge is motivated to (1) believe that the action is not included in X category or (2) make the exemption while law qualification seems to be legalized by grammatical analyses. There are some questions to determinate whether an action categorized as per se illegal. Is there any social benefit for price fixing (that can't be obtained through competition) in any environment? Does it frequently happen? (2) Isn't there any better way to cope with that problem? (3) Is the executive board capable of making trustable acknowledgement to certain cases on the benefit of price fixing, the risk ratio, or its perpetual adjustment while the bad risk is unavoidable? (4) Can the advantages be verified in certain case, or in other words, can the court decide the cases that are worth legalizing? (5) Cartel acknowledgement does not only need to have benefits or their opposite, but it has to significantly deal with price fixing materials that are not commonly by some accepted acknowledgement. Shall the court be authorized to permit cartel in the name of public interest? How to barter the benefits with the rise of price and the decrease of product? (6) Is that absolute prohibition beneficial to restrict any person potential to apply price fixing, through the explanation on the prohibition or the related sanctions?

While a collaboration contains both pro-competitive and anti-competitive characteristics, we my apply rule of reason. This therapy is used in multi-factor investigation that questions three main things. First, Does the trade barrier limit the output and raise the price? Second, do the efficiency benefits higher than the emerging consequences of anti-competitive? Third, is the restriction absolutely needed to achieve efficiency? Thereby, it seems that rule of reason directly focuses on the impact of competition condition that emerges from the action of restriction. The first case on rule of reason is the case of Mitchel v. Reynolds as the following. Mitchel illustrated when the promise of a bakery to avoid competing with the buyers should be valid. The promise/contract will have an effect only in limited period and in the region, that he/the bakery usually does his business. Since then, although that action keeps the public away from potential competition, it is admitted legal. Therefore, the benefit of the long-term product augmentation will be higher than the loss of that temporary and limited competition.

The rule of reason, that Reynold v. Mitchel mention, has been used for verifying the contract to restrict barrier that encourages transaction legalization, such as labor or sale contract in business sector. Judge Taft (in the case of Addyston Pipe) took the advantage of rule of reason to refuse the argument on that all competitors might legally consent to sell their product with the same price as long as the price is reasonable. The above case, along with other court's decisions, obviously revoked the elucidation of rule of reason that allows the investigation towards the prices that are regulated by civil contract. Those cases rub out the argument on that due to some peculiar characteristics of certain industries, monopolistic contracts might promote the trade and commerce much better than competition (Trans-Missouri; Joint Traffic).

Those arguments were brought before the congress and could legalize the exemption, which was done by the law, for certain industries. But this exemption is not permitted by rule of reason. As while a judge investigated Standard Oil case. " Trade barrier in the scope of law can not be separated from that category by referring to the general excuse for the experimenting or non-experimenting ratio to set up contracts or policies or policies' will of the law to prohibit what they are doing".

The test on the case of Standard Oil v. US indicates that the sued contract or the action restricts improperly the competition condition. This impropriety can be caught through (1) the nature and characteristic of contract, or (2) according to the surrounding situation, their intention to restrict the trade and raise the price. In one of its tests, the investigation is assured to deal with the consequences of competition condition. The judge says, in Chicago Board of Trade case, the investigation that is based on rule of reason is to determine whether the charged contract improve competition or otherwise. The test on validity concerns about whether the restriction is legal that encourages competition, otherwise, damages, or rubs it out.

2.5. The Relationship between Per se Illegal and Rule of Reason

Although having benefits, law simplification contains setback. The endeavor to use the simplified law always comes up with the imperfect coherence between the width of effect and the prohibited actions. In connection with this matter, it is interesting for us to look into the opinion of Issac Ehrlich and Richard Posner. They say the ambiguity of language, limited future forecast and human know-how determine his competence to apply the law, to record, coordinate accurately and profoundly the environments that activate the common standard. Thereby, standard simplification into a law practically creates either over-inclusion or under-inclusion. According to Article 1 Sherman Act, over-inclusion restricts the contracts that encourage or do not endanger competition, whereas under-inclusion provides an access for the collaboration that damages competition. Therefore, to simplify the law, we have to lessen the above guilty as much as possible. The endeavor to undertake the simplified law always yields the imperfect coherence between the width of effect and the prohibited acts.

The above imperfect coherence is unavoidable. Per se illegal, which prohibits open price fixing, preconditions the judge to determine whether the price fixing has restricted the output (and guarantees open price fixing) or enabled to legally achieve the business goal (by asking a more full-fledged analysis on the benefits and consequences of competition). Qualification enables the judge to accommodate per se illegal by expanding the operative terminology of the law (so that decreases inclusiveness). Or the judge might conclude that the terminology should not be applied on the action that is under control of that laws (so that decreases over-inclusiveness). Therefore, qualification introduces some flexibility for applying per se test, even, the simplest one.

To minimize over-inclusion and under-inclusion, Validity test provides a judge the access for considering all trade aspects that might restrict the good maintenance. However, this flexibility does cost much. But this kind of tests needs more data sources (and the related information) from judge and attorney since this test extends the scope of the goal. Moreover, this test might decrease the certainty of the validity of the specific action that might damage the action that is socially beneficial and increase the lawsuit frequency in court. By promoting the judge's access and his decision appliance, this test might bring about the extreme inconsistency and uncertainty of accomplishing the lawsuit, and this condition could raise the risk of committing guilty or improper conduct of public decision makers.

2.6. Economic Considerations on Rule of Reason Appliance

Judge's competence (to identify which market is susceptible to collusion and which market is characterized with it) will significantly influence his competence to evaluate the information exchange that facilitates contract or restrict corruption (such as the information about the preceding sale in some extended period and current stock). Judge Richard Posner has listed some beneficial factors to look into those cases, to remind of that the presence or the absence of one of those factors regarded as a disposition.

The factors that determine whether a market is susceptible to collusion, therefore information change could conclude that there exists a coordinated price, are as the following. (1) There exist a number of buyers and sellers. (2) Consumers are not sensitive to the price in certain competition rate. (3) Long period of market access. (4) The products purchased in standard, and are frequently configured. (5) Common manufacturing cost. (6) Standardized products. (7) Equal decree of all vertical integration. (8) Most of competition based on cost. (9) Static or declining demand. In addition, Postner indicates some indicators to determine whether explicit or implicit collusion has happened in certain market. (1) Stable market segment. (2) Consistent and perpetual price discrimination. (3) Stable price variety or common public sale.

2.7. The Acts regarded as Per se Illegal and Rule of Reason

The United States affirms that those following actions are included in per se illegal, price fixing (either horizontal or vertical); tying arrangements; vertical and horizontal boycotts; and reciprocal dealing. And other actions, such as vertical territorial restraints; exclusive dealing agreements; convenants not to compete; and mergers (which its validity against Article 1 Sherman Act aor Article 7 Clayton Act). The Australian Competition Law, as regulated by Trade Practices Act 1974, includes those following acts in Per se Illegal, such as price fixing (either horizontal or resale price maintenance, excluding joint venture arrangements and arrangement for joint acquisition and advertising); primary boycotts; and third line forcing. While other actions, such as exclusive dealing (excluding third line forcing); product exclusivity (such as solus agreement, requirement contract, and tying and forcing arrangement); price discrimination; and merger and misuse of market power are regarded as rule of reason.

Meanwhile our Antimonopoly Law states that horizontal prize fixing; boycotts; and third line forcing are include in Per se Illegal. And other actions, such as cartel; vertical price fixing; market allocation; oligopoly; merger; acquisition and consolidation; trust; oligopsony; monopsony; vertical integration; and abuse market of power are regarded as rule of reason.

In parallel to rule of reason, our Antimonopoly Law does not mention the word substantial that is obviously written in The United States' Antitrust Law, Australian's, and Treaty of Rome. Those two distinguished laws have different intensity. The former states that an action shall be prohibited while causing monopoly practice and unfair business competition, whereas, the latter asserts that an action shall be prohibited while lessening the substance of competition. Indeed, the word substantial contributes positively to certainty of law and justice. Thus, it's very necessary to care for the decline of competition ratio.

As a matter of fact, each competition law has its specialty in determining whether any action included in per se illegal or rule of reason, or each country has its own definition. The differences of definition are based on propriety and fairness, efficiency, certainty of law, and public benefit. The excessive appliance of Per se Rule might reach the actions that are not damaging or even encouraging competition. Meanwhile the appliance of rule of reason requires verifying the existence of competition degradation or damage. As a consequence, Business Commission Supervisory and those who sustain a loss bear a heavy burden. However, the concrete concept to distinguish between the action that encourages competition and the one that discourages is until in quest.

3. Prohibited Contracts

3.1. Background

Some states, aware of the importance of competition, have tried to support their economic system by some specific provisions. In line with this condition, Indonesia enacts UU No.5 1999 on ban on monopoly practices and unfair business competition, which prohibits several contracts (Article 4 to 16), a number of activities (article 12 to 24) and dominant position abuse (article 25 to 29). In accordance wit the mentioned law, some problems might be discussed, such as its vagueness, or it is not further clarified in elucidation passages.

The fact that joint venture is not prohibited (excluded from the ban on price fixing) is another interesting sample. But our law does not mention specified reason for this decision (to give this exemption). Meanwhile, according to the United States', European Union's and Australia's, this facility might be bestowed while the benefit of joint venture is much more than the consequence of anti-competitive. In fact, in connection with price fixing contract, Australia holds on to that the exemption is only in its characteristic. Moreover, the right for intellectual property (HAKI)(and its law) is another problem to concern about (see Article 50). Thereby United States, European Union, and Australia hold specific law on the contract on HAKI, such as on abuse of market power and price fixing. The content of article 50 is presumably so imprecise that make the people sustain a loss.

3.2. Contract Concept in Line with UU No. 5 1999

Article 1 Number 7 UU No. 5 1999 states: "Contract is an action by one or more entrepreneurs to bind themselves with one or more other entrepreneurs under any name, either made in writing or not".

While looking into the above definition, we might conclude that:

a. The contract does not mention the definite goal.
b. The contract takes place due to an emerging action.
c. There exist some undertakings (entrepreneurs).
d. The contract could be written or unwritten.

As it does not include the goal of contract, the definition of contract will not be imprecise unless it is related to the actions based on the contracts that are regulated by the subsequent articles.

In parallel to Article 1313 KUHPerd, Article 1 number 7 uses the term action also. According to some authors, the use of action as referred to in Article 1313 is an absolute setback and is considered imprecise. But, to the authors, it is beneficial to competition law, because covers a wide-range of ban.

The word parties mentioned in the above article means undertakings. Article 1 Number 5 UU NO. 5 1999 straightforwardly states that undertakings might be either private persons or corporations that are established and located or that perform activities in Indonesian territory. According to the United States' Antitrust Law, foreign business that affects negatively on American trade condition will be prosecuted before the American court. Meanwhile, Article 1 Number 5 does not define clearly whether the undertakings shall be located or shall perform the activity in Indonesian territory. If it is not compulsory to be located in the state, the definition of private person will be vague then. Unfortunately, the elucidation of this law doesn't explain this term.

While, Article 1 Number 7 defines the contract as the one-sided contract. But notice that the law aims for all kind of contracts. So, our law can cover a wide-range of aspect, but isn't it too strict? In price fixing contract, for example, the contract regarded exists while an undertaking follows the other (the second) undertaking's price or product even though the second undertaking does not tie himself on the first undertaking. As the latter is not tied on the former under any contract, he might then freely change the price so that competition could prevail. Could we admit this conduct as against competition although price fixing contract included in per se illegal? Remember that to include certain contract in per se illegal requires definite reasons, such as that the possibility of negative effect on competition is much bigger. Another problem might appear while price fixing contract is not written. When the price varies, it's difficult to prove whether the contract has ever been hold. Therefore, the definition of contract might be still more relevant if the two parties keep on the former price.

To Australian Competition Law, contract is defined as a usual agreement that preconditions such a significant consideration in which each party contributes something. One-sided contract in Australia is out of question. In fact, the terminology of arrangement and understanding that is used in the law requires meeting of minds between the two parties. While, agreement that, in the United States, covers contract, combination, or conspiracy, as referred to Article 1 Sherman Act, imposes a mutual action of the two parties. Whereas, the concerted action is allowed while there is unity of purpose, or understanding, or meeting of minds.

One-side agreement, according to this law, has the identical definition as article 1313 KUHPerd, which has also setbacks. Its setbacks are admitted insignificant, and therefore no amelioration towards this law is done. Indeed, this underestimation might cause undertakings getting involved in per se illegal practice and so that to be punished.

The problem going to emerge while one-sided agreement permitted is that competition will be devastated. To handle this problem, one might employ the other provision such as conspiracy. So, despite the law on agreement is not applied, still one must comply with this last provision. In the United States, ban on conspiracy has the competence to find out whether any contract has taken place. At the time, Arrangement or understanding has dealt with the identical problem in Australia. Besides using contract as the terminology, Japan has engaged agreement or any other concerted action in order to extend the effect of its Antimonopoly Law. In connection with this provision, UU No. 5 1999 has settled a ban on conspiracy under article 22 and 23. Unfortunately, these two articles only deal with certain types of conspiracy. The fact that article 1 number 7 uses the terminology of at any name cannot fix the problem as it is limited by the prior definition, one-sided tying.

4. Various Prohibited contracts

These following passages are going to explain a few of contracts prohibited by UU No. 5/1999.

4.1. Oligopoly

According to this law, Oligopoly is prohibited by the provision under article 4 paragraph 1 UU No. 5 1999 while damaging competition. So, it's not included in per se illegal. Therefore, this prohibition is very limited in accordance with the limitation of agreement.

For example, Oligopoly in the United States can be punished under either Section 1 or Section 2 that engages the terminology of combine on conspires …… to monopolize. The usage of both terms is realistic, as some oligopolies done not under formal contracts.

Oligopoly might take place in the form of implicit verbal negotiation, for example, it might happen as some undertakings hold a press conference to announce some provisions concerning their business such as on supply and demand, profit, expected output and its product price, and so forth. The more detail the announcement, the much more possibility for implicit verbal agreement to take place. If each undertaking hold a perpetual and orderly press conference, he will achieve the common price that usually happens likewise in common negotiation or agreement. Moreover, Oligopoly might happen while there is a tacit collusion, for example, in price fixing, each undertaking depends on each other and complies with the one that manages price leader. The usage of the word combination or conspiracy, in this term, might cover the monopolistic practices. Nevertheless, unity of purpose or understanding and meeting of minds have to engage too. The provision under article 4 (1) seems to be imprecise in defining market domination and/or goods and services marketing. Therefore, while 5 undertakings settle a price fixing agreement, for example, can we then admit them settling a contract to dominate production and/or marketing. In fact, they might be punished under the ban on price fixing contract (article 5 paragraph (1)), not under the ban on monopoly agreement though. They could be punished under Article 4 paragraph 1 while their act leads to monopoly practice or unfair business competition that is explained in article 1 number 2,3 and 6. This definition must be more apprised such as by market segment percentage, or we might refer to article 25 paragraph (2) on dominant position. Article 4 paragraph (2) does not include a complete definition as it presumes that 75% of market segment controlled by 2 or 3 undertakings has indicated that they dominate production and marketing. There might appear some opinions on article 4 paragraph (1) concerning percentage, in other words, isn't that 75% is too excessive?

4.2. Price Fixing

a. Horizontal Price Fixing (Price Fixing)

Article 5, paragraph (1) prohibits undertaking to settle any agreement with his competitors to fix the price on any product and/or service for consumers or customers. Therefore, under this contract, the competition among undertakings will not exist.

Price fixing, according to Australia (Section 45A Trade Practices Act 1974) and the United States (Section 1 Sherman Act 1890) is regarded as naked restraint of trade with no purpose except the stifling of competition, and thereby is included in per se illegal.

It seems that Indonesia complies with the provision of those two states, as according to article 5, paragraph (1), horizontal price fixing is prohibited in no respect with the negative effect of the agreement on competition. Since price fixing is included in per se illegal, the lowness and the highness of the price have no significant impact. In other words, although the negative impact on competition is little, price fixing is still prohibited. Market power, in this term, is not relevant too, although the possibility of price augmentation is bigger while market share increases.

The definition of article 5 paragraph (1) seems imprecise, such as on fixing and price. Price fixing agreement might be performed in the form of agreement on mark-up, agreement on certain formulation of price estimation, agreement on abolishing or setting discount and rebate, agreement on credit prerequisites for consumers or customers, agreement on abolishing the cheap products to restrict the supply and keep the high price.

b. Vertical Price Fixing (Resale Price Maintenance)

Agreement on resale price maintenance, in which suppliers fix the lowest price with which distributors has to comply, might take place between suppliers and their distributors. In other words, the distributors are prohibited to sell and re-supply those products and services with the lower prices.

One of the reasons for settling the agreement on resale price maintenance (RPM) is to avoid intra-band competition among distributors that endangers the stability of distribution network. Besides, suppliers want to keep the good impression of their product quality on consumers. Moreover, resale price maintenance might take place to implement the price fixing of the cartel hold by retailers. Since the appliance of this agreement is difficult, retailers force the suppliers to implement this agreement through an agreement on RPM. In this case, a supplier might fix RPM to undertake the agreement on price fixing among suppliers.

Article 8 UU No. 5 1999 states that RPM is prohibited while causing unfair business competition. So it is not price fixing, and is therefore not regarded as per se illegal. We wonder why this difference happens, although in fact, both concern about price that is the main subject of competition law. Meanwhile, according to the United States and Australia, price fixing and RPM are regarded as per se illegal.

Price fixing and RPM are both damaging competition and consumers. One of the differences between them is that, in RPM, retailer is a victim and is alienated because he dislikes that RPM. Therefore, in Australia, it's easier to confirm the existence of RPM than that of price fixing, because retailers (that are commonly keen on giving discount) usually report it to ACCC and deliver immediate evidences.

4.3. Market Allocation

Price fixing is not the only agreement to control prices. Agreement not to compete among undertakings is an indirect way to control prices. They distribute the marketing area of products and services. There are some ways of market allocation: first, the undertakings distribute the markets geographically; second, distribute types and customer or consumer's class (such as wholesalers or retailers); third, distribute the market based on the issued product (such as the tool of professional video and of the amateur one).

The provision under article 9 UU No. 5 1999 states that market allocation is not per se illegal and is prohibited while causing monopoly practices and unfair business competition only. Mean while, this agreement is per se illegal in the United States. The United States Court treats equally market allocation and price fixing. Price fixing agreement enables each undertaking to sell his product in monopolistic price with no fear of that other competitors will mark the price down. While, market allocation creates the same condition, as each competitor does not have to compete to attract the consumers, as in effect, he might freely fix the monopolistic price.

Market allocation might bring about more efficient production or marketing. For example, all competitors might agree not to produce certain products or leave certain locations and focus on certain products or location to obtain the economies of scale and specialization, or therefore the greater efficiency is achieved without an agreement among competitors.

4.4. Cartel

Cartel could be defined as an arrangement in which competing firms have substituted an agreement on price, output, or related matters for independent decision-making. Therefore, price and output are the main things on which each party in cartel should independently consider to erase competition. Article 11 UU No. 5 1999 prohibits the agreement among competitors to influence the price through controlling production and/or marketing certain products or services. This ban might have an effect while that cartel agreement could cause monopoly practices and/or unfair business competition.

Through the content of article 11 UU No. 5 1999, we might conclude that foreign laws don't influence the mentioned law. Cartel in the United States, as well as price fixing, is admitted as naked restraint that is aimed for controlling price ratio and output. While, this kind of agreement, according to Section 1 Sherman Act, is regarded as per se illegal. Thus, cartel is prohibited without regarding the common price, the market power of each party, even without regarding whether the agreement is exercised or not yet exercised. Under Section 45 yo. 4d (1) and 45A (1) Trade Practices Act 1974, Australia regards cartel as per se illegal also. Mean while, Europe prohibits this kind of agreement under Article 85 Treaty of Rome.

The reason of that foreign countries regard cartel as per se illegal is that price fixing and other cartel acts influence negatively on price and output instead of competitive market. Instead of negative impacts, cartel barely causes efficiency or produces a little efficiency. A successful cartel will bring about provisions on price and output such as provisions issued by single monopolistic firm. As a consequence, first, cartel gets the monopolistic profit from the consumers that frequently buy the products and services based on cartel price. Second, wrong resources allocation caused by output reduction, because consumers should buy by competitive price, moreover, some resources are used up to preserve the existence of cartel.

But notice that cartel should be tolerated, as it might create stability and certainty of market, or might expend its monopolistic profits on public research. Cartel, generally, is stable only while government protects it. Cartel depends on the achievement and the perseverance of contracts that are done by the most of undertakings, which usually seek the profit through corrupting cartel. Cartel agreements are unreachable while the industries of each cartel member require varying production costs. To achieve this agreement, the efficient production cost is needed. While this agreement gained, each member is likely to corrupt by engaging rebate and discount to consumers. In addition, while the price is taken in monopolistic level, other competitors will enter the market. Thereby, cartel is not defensible.

The legislators of UU No. 5 might have been influenced with the above arguments that tolerate cartel and therefore cartel is categorized as per se illegal by article 11. By the way, these arguments have some setbacks:

First, Cartel creates pseudo-stability and a pseudo-certainty of market, as it is not parallel to supply and demand powers that influence the flow of price. Moreover, Cartel cannot guarantee the members to use their monopolistic profits in the name of public interest.

Second, Most of cartels do not last long; this short duration might damage competition and consumers.
It seems that Indonesia imitates Japan to engage substantial restraint of competition that is obviously contrary to the public interest. Thereby, cartel shall be admitted illegal only when it has been exercised and has substantially lessened competition.

Japan's Fair Trade Commission, in this concern, will take action against undertakings (cartel members) since their first step of holding cartel agreement. So it is assumed that cartel must be stopped early in order not to substantially lessen competition.

4.5 . Boycott

According to article 10 UU No. 5 1999, boycott is a horizontal agreement among competitors not to have contact with the other competitors, suppliers, or consumers. This agreement might be in the form of toppling either directly or indirectly other competitor, forcing suppliers or customers to cease having contact with other competitors. This boycott might shut the access to input for other competitors.

In Australia, boycott, which is called exclusionary provisions by Section 4D the Trade Practices Act 1974 is absolutely prohibited without regarding the existing effect on competition. It seems that article 10 (1) UU No. 5 1999 imitates Australian law. The difference is that paragraph 2 of this article requires a loss in undertakings that cope with boycott and trade barrier. However, negative impact is not compulsorily needed and does not influence the existence competition.

5. The Exempted Contracts

5.1. Exempted from all provisions in UU No. 5 1999

Article 50 exempts those following agreements from all provisions: agreement to submit to the laws, agreement on intellectual property, agreement to set up certain technical standard, agreement on agency, agreement on cooperative research to promote and improve people's standard of life, a ratified international agreement, and agreement to export. Unfortunately, the elucidation of this law does not explain those agreements. The imprecise of definition might cause the abuse of the mentioned agreements.

Agreement to submit to certain laws, for example, might be abused by the government or undertakings that collude with the government by implementing certain privilege for undertakings, such agreement to establish or protect cartel.

Meanwhile, the United States is popular with state action doctrine, which means that antitrust law is only in effect in a business as long as it is not to exercise federal laws. However, the anti-competitive federal laws might become illegitimate while in conflict with: (1) Constitution, in the form of inappropriate trade barrier, (2) First amendment of constitution, or (3) Federal government's law, such as Federal Trade Commission Act or Patent Law.

Indeed, to clarify the exempted agreements are necessary. Instead of their negative effects of anti-competitive action, these agreements still need to contain more benefits for people. Exempting the agreement concerning the right for intellectual property (HAKI) is acceptable. Although it is a kind of monopoly, it is not against the antimonopoly law. The Supreme Court of the United States in Atari Games Corp. v. Nintendo of Am., inc. (1990) stated that patent and antitrust law are complementary, as both are aimed at encouraging innovation, industry and competition.

If agreement on HAKI is absolutely exempted, there might happen, such as tie in (one of exclusive contracts as referred to in article 15 (2) UU No. 5 1999) in which the owner of this patent right preconditions consumers to buy the patented products. While the owner of this patent obtains market power, this condition will damage competition and consumers.

In the United States, while the owner of patent handles a sufficient market power, such above Tie-in shall be regarded against the antitrust law. This state regards price fixing in agreement on cross licensing in patent as per se illegal. Agreement on HAKI, according to Australia, although exempted by the Trade Practices Act 1974, should not violate Section 46 and 46A concerning misuse of market power and section 48 concerning resale price maintenance.

The position of UU No. 5 1999 is internationally not worthwhile, as when the international world suspect the negative effect of HAKI licensing, Indonesia acts the opposite reaction. Article 40 paragraph (1) concerning TRIPs agreement (Trade - Related Aspects of Intellectual Property Rights) asserts that the members of WTO come to agreement that some of licensing practices might restrict competition and hereinafter restrict trade and technological transformation. Paragraph 2 of the same article states that the members could determine in the law provisions the practices and preconditions of licensing that could damage competition. Although this international contract has not obviously indicated yet the licensing practices that restrict competition, it has pointed out that there is indication of international opinion that agreement on HAKI should not against antimonopoly law.

The policy makers begin to think that the above exceptions shall be elucidated or redefined, to avoid abusing. In concern with the agreements on HAKI, article 15 concerning exclusive contract and article 25 concerning dominant position abuse is still applicable.

5.2. Exempted from Certain Articles

There are two kinds of contracts that are exempted from article 5 paragraph (1) concerning horizontal price fixing; contracts based on current laws and ones in joint venture. The contracts based on current laws will be in effect is in accordance with " the contracts that are aimed for exercising the current regulations…. " as referred to in Article 50 (a). They both are substantially identical. It is worried that the contract makers referred to in article 5 (2) b claims that their contracts are absolutely exempted form article 50 (a).

A contract in joint venture is also exempted from article 5 (1), as a joint venture among non-competitive sides will not bring about anti-competitive effect. Yet, it has not been clarified yet what kind of joint venture. However, while this joint venture yields collateral restraint, it will risk being prosecuted against the competition law. In addition, joint venture among competitors will decrease competition, unless it is performed to fulfill market demand that is never or will be fulfilled individually by each side. Therefore, it could be concluded that some contracts might still damage competition and that it is necessary to clarify what contracts in joint venture might be exempted.

As a sample, Section 45 A (2) and (4) Australian antitrust law exempts agreements in joint venture from the provision concerning ban on price fixing. But this exemption only has concern with per se only, or it will be prohibited while found out having anti-competitive goal or effect. So, there need some requirements to take the advantages of this facility.

According to the Export Trading Company Act 1982 (the United States), to obtain the immunity from antitrust law, the joint venture that undertakes export should fulfill those following requirements. It should not damage competition and trade or export trading in US, not raise, stabilize or press down the price improperly, not cause unfair competition, and so forth. In line with this provision, the Department of Justice and the Federal Trade Commission has provided guidelines for certain joint venture to have the use of limited immunity of antitrust law.

In European Union, joint venture is basically regarded as decreasing and/or damaging competition and thereby violates article 85 (1) the Treaty of Rome. However, the EU Commission could issue the exemption under article 85 (3) in condition that this business could improve and expand the production and the distribution of goods or services, or encourage technological and economical advancement and hereinafter enable consumers to get the just proportion from the profits so that doesn't cause limitation and restriction on the competed product.

5.3. Summary

The emergence of UU No. 5 1999 sends an impression that this state is willing to advance its economy, although some items contained in this law are still imprecise, such as the definition of contract mentioned in article 1 number 7. This law, as well as article 1313 KUHPerd, states that the contract is one-sided and thereupon is regarded too strict. Although this law does not damage competition, it is prohibited, as one side of contract settlers does not adhere to it. On the other hand, the merely usage of contract term cannot expand the scope of ban in this law. Meanwhile some foreign undertakings have committed anti-competitive action by avoiding the formal contracts. This action might happen in our country also. The term conspiracy is too limited for covering more related cases.

The setbacks of this law are clearly seen in the article that prohibits oligopoly contract. While, in other countries, olygopoly could happen without formal contract, but they use implicit verbal negotiation or tacit collusion for substituting formal contract. We wonder why this law treats unfairly between horizontal price fixing and vertical price fixing (resale price maintenance) --- the law takes softer action on the latter. In fact, both are naked restraints for competition.

The article obscurity concerning the exemptions in this law is also in question. Article 50 makes such an excessive exemption that might be abused. The absolute exemption on HAKI is a big mistake, although it is a legal monopoly, it could be misused for damaging competition and consumers. The exemption of contract in joint venture from price fixing provision as referred to in article 5 (1) is the lawmaker's sloppiness, as only few of joint ventures encourage competition.

III. 2. PRICE FIXING AND MARKET SHARE

1.1. Background

This section is mainly going to discuss on how producers arrange the strategy of price fixing in order whether to attract consumers or to maximize their profit, or to take over market segment of other competitors. Some methods of price fixing are going to be discussed too. The goal of this discussion is to describe what has underlain producer's performance to fix price and how is the implementation of those strategies.
The discussion firstly describes how price might happen under a market mechanism, and how a market mechanism determines a price. The following passages also discuss some general strategies by which producers could maximize their profit and some strategies of price fixing that are aimed for setting up a barrier for competitors or devastating competition.

On some other passages, this section is going to discuss about market and method of product identification. In line with this discussion, some methods of market segment estimation and some available information sources will be introduced.

1.2. Price Fixing and Its Impact on Competition

To gain a better understanding about market, let us notice these followings. There are two involved sides in every market transaction, buyer and seller or consumer and producer. Price depends on the relative power of those two sides. This power depends on or is limited by three types of competitions: (1) inter-consumer competition, (2) consumer-producer competition, and (3) inter-producer competition. Each competition has its own impact.

1.3. Inter-consumer competition

This kind of competition takes place due to the limited products and services on the market. This circumstance weakens the bargaining position of consumers. So, due to the limited products and services, consumers have to fight each other for supplying their own demand. The consumers competent to pay higher than other competitors will get the needed products or services. However, this condition does not only happen in a perfect market competition, but in monopolistic market also.

1.1. Consumer-Producer Competition

This competition emerges due to different interest between consumer and producer. Consumers strive to get a better price (cheaper), whereas producers desire the higher price for their products and services. Each side, for sure, has its own limit to reach the price motivation. While consumers offer the cheap price, producers will object to give in their products or services. Otherwise, while producers set up the more expensive price, consumers will certainly refuse the offer. The bargaining position of both producer and consumer brings about natural analysis and balance system in a market mechanism, including a monopolistic market.

1.2. Inter-Producer Competition

The third type of competition is inter-producer competition, which occurs while two or more undertakings purchase certain commodity in market. Under assumption that there are only some limited consumers, Producers will fight for recruiting consumers by improving the quality of products and services. This type of competition promotes the bargaining position of consumers.

1.6. Government and Market

While consumer or producer is conscious that he sustains a loss, he could involve government to interfere. For example, in the case of BUMN, consumers might ask government to limit the producer's power by determining the price of electricity. On the other hand, the producer (PLN), through the government's aid, could strengthen its bargaining position to deal with consumers or foreign competitors. Hence, in this modern economy, government significantly participates in market mechanism.

2. Price Fixing Tendency

This section is going to explain undertaking's strategy in price fixing. That is to fix common price for all consumers, in which marginal revenue equals marginal cost. The next section will firstly discuss on the economic standard of each price strategy and subsequently see how it is implemented in monopolistic and oligopolistic market.

2.1 Basic Rules on Profit Maximization

The powerful producers in market encompass the decline of demand curve for the offered products. By high price, producers decrease the total commodity. So producers get trapped in whether they should purchase a big quantity of products in the cheap price or otherwise, purchase a small quantity of products in the high price. Profit maximization is to maximize the per-unit price affordable to consumers in the level (total quantity) of the offered products.

2.2. Price Determination in Monopolistic Market

While producers are capable of estimating the demand and the cost of the offered products, profit maximization calculation could be simply done. Otherwise, the calculation would be complicated.

2.3. Price Determination in Oligopolistic Market

We have already known that there exist some producers offering products and services to all consumers in oligopolistic market. They could offer several types of commodities or the same commodity. Another characteristic of this market is that each producer believes that his competitor will keep his total commodity supply in the level that other competitor alters the supply.

3. The More Profitable Price Fixing Strategy

In some market, producers could fix more profitable price than the profit produced by price fixing strategy in which producers fix only a single price for all consumers. However, notice, those strategies could ruin business competition.

3.1. Absorption of Consumer's Surplus

The first strategy is the groups that implement the more profitable price fixing on monopolistic and oligopolistic groups of market. To obtain the maximum profit, producers will absorb as more consumers' surplus as possible. The group is comprised of price discrimination, two-part pricing, and commodity bundling (combination of two commodities in one price).

3.1.1. Price Discrimination

Instead of price fixing, in which producers fix the common price for all consumers, price discrimination fix the different price for each consumer or each group of consumers. There are three types and levels of price discrimination strategy: the first, the second and the third level. Each level appeals for different information on consumer.

3.1.2 The First Level Price Discrimination

Ideally, producers should exercise this first level strategy, in which they fix the different price for each consumer so that the consumers bear the highest price. Moreover, those producers could absorb all consumers' surplus and thereinafter get the highest profit. However, this perfect price discrimination strategy might be implemented only on certain cases, as it forces producers to know exactly the maximum quantity paid by consumers for the offered products.

Some service and good's producers, such as engineer, doctor, and attorney could use this strategy. For example, automobile distributor usually sticks the sticker on the purchased car. The sticker, which its price is commonly higher than the real production cost, might offer some discount based on the consumer's background.

The professional automobile seller will professionally estimate each consumer and therefore determine the minimum discount for consumer in order to possess a car. Therefore, in this case, the seller might implement different price on each buyer based on his interest and competence. This strategy enables producer to obtain much greater profit than while implementing the common price for all consumers. In connection with this strategy, attorney and doctor seem to be interested in using so.

3.1.3. The Second Level Price Discrimination

Under the circumstances, that producer cannot identify the maximum price on each consumer, or that he cannot keep on the same price structure for extra sale unit, he might apply the second strategy, by which he could absorb some consumer's surplus.

In this strategy, producer applies the different price for each buyer based on the commodities ordered. The consumer that could buy more products would get the cheaper price. Otherwise, the fewer the commodities ordered the more expensive the price. Grocery seller or big department store commonly uses this strategy. For example, the price fixing on one tin of Coke will differ from that on a pack of Coke (usually contains 12 tins). This entices consumer to buy the 12 tins.

3.1.4. The Third Level Price Discrimination

The last type of price discrimination is commonly applied by the producer, which is aware of that the demand of consumers on product systematically varies based on consumers' characteristic and their demographic group. Under this circumstance, producer could earn some profits by implementing different price on each consumer group. For example, a department store could apply discount for student, or hotel and restaurant could do the same for the advanced age consumers.

3.1.5 Two Part Pricing

The next strategy applied by producers for encouraging profit maximization is two part pricing, in which producer employs the fixed price for buying or using products or services and engages the additional tariff based on total consumption. In parallel to the first level price discrimination, this strategy enables producer to absorb some of or in fact, all consumers' surplus by implementing per unit price that equals marginal cost plus the fixed cost (that equals consumer's surplus).

Athletic clubs and fitness centers are of the undertakings that use this strategy. They generally implement the membership cost added with per unit cost based on the total attendance. While the marginal cost is low, per unit cost is also low. In more extreme case, while the marginal cost is zero, the profit maximization under this strategy is zero for each attendance, but they will employ the membership cost that equals consumer's surplus. Therefore, with this strategy, producer might take the profit from the fixed cost (the membership cost). To obtain the maximum surplus, producer should implement per unit cost that equals marginal cost, as the maximum profit has been earned form the fixed cost (membership cost).

3.1.6. Commodity Bundling

Another strategy to maximize profit is commodity bundling, by which producer implements a bundled price on two or more commodities. For example, a travel agency generally would rather offer a traveling packet rate that includes transportation, hotel and consumption than per service cost. Another example, computer distributor prefers to sell a unit of computer than per kit (ware).

How this strategy encourages profit maximization, let us see the following illustration. Under the circumstance, computer distributor will sell CPU and monitor separately. While, the first consumer is willing to spend Rp. 2000.000.00 on computer and Rp. 200.000.00 on monitor, the second consumer is disposed to pay Rp. 1.500.000.00 for CPU and Rp. 300.000.00 for monitor. On the other hand, the distributor has no adequate information about the willing and the purchasing power of consumers, if the distributor offers Rp. 2.000.000.00 for computer, he might only sell one unit of CPU (not two), because the second consumer is willing to spend on the mentioned cost.

This identical consequence might happen too, while fixing Rp 3.00.000.00 for the monitor. Only the first buyer is willing to pay that price.

The first scenario to increase the total sales is by pricing the CPU Rp. 1.5000.000.00 and the monitor Rp. 200.000.00. Under this price, this distributor might sell two units of each apparatus. The total sales is therefore 2 (Rp. 1.5000.000.00 + Rp. 200.000.00) = Rp. 3.400.000.00.

While, the second scenario is bundling price, by which the distributor could earn much more profit than by the first scenario. In this scenario, the distributor will sell both computer and monitor Rp. 1.800.000.00. As mentioned before, that the first customer is willing to spend Rp. 2000.000.00 + Rp. 200.000.00 = Rp. 2.200.000.00, and that the second consumer is disposed to pay Rp. 1.500.000.00 + Rp. 300.000.00 = 1.800.000.00 for both computer and monitor. Thus, by the second scenario (Rp. 1.800.000.00), this distributor could sell two units of each (computer and monitor) and thereinafter get Rp. 3.600.000.00 that is higher than the first scenario (that earns only Rp. 3.400.000.00).

3.2. Pricing Strategy for Particular Cost and Demand Structure

The following passages are going to discuss some pricing strategies concerning the difference of the cost structure and the demand ratio on the offered products and services.

3.2.1 Peak-Load Pricing

There are some markets undergoing a period in which the demand on products and services is very high and another period in which the demand on products and services is very low. Public transport, for example, might get many commuters in the morning, but, in the afternoon, get only a few. This condition could also takes place in electricity, telecommunication and flight companies in varying period classifications.

If the demand highly rises in busy time, meanwhile, there is a limited supply capacity at the same level price, producer is likely to fix the different price for busy time and non-busy time. Besides gaining the maximum profit in busy time, this strategy could redistribute to the non-busy one, meanwhile, consumers, under the circumstances, will adapt the consumption to their purchasing power, priorities and interest.

It seems that this strategy resembles price discrimination strategy only that the capacity limit makes producer unable to obtain maximum profit from the consumers that prefer the consumption in different period.

3.2.2 Cross-Subsidies

The second type of price fixing based on cost is **cross-subsidies,** which is used under the circumstance producer issues the product with the complementarily costs, and interrelated demands on the groups of product. So, consumer could not use product A without product B (A and B are groups of product). This strategy is intended on making producer able to take the advantage of the profit of one product for other product cost. Under the circumstances, producer on the one hand might sell one product under the price level of marginal cost, and on the other hand engage very expensive price for the other products (supplementary product). A hotel for example could employ the low price for the room, but on the other hand sells the food and beverage at high price.

3.3. Pricing Strategy at Tightly Competitive Market.

The following passages are discussing about price fixing strategy at competitive market. This kind of strategy is commonly practiced in oligopolistic market where some undertakings (producers) offer the same commodity.

3.3.1. Price Matching

This strategy is intended on advertising that producer will sell his product under competitor's price. Commonly, producer promises to fix the price lower than other competitors and give to consumers double restitution. The advertisement is sometimes very fascinating, such as: " while you find other lower prices, we 'll return twice as much the difference. We guarantee the best price".

That strategy, indeed, fascinates and thereinafter prompts consumers to confirm other competitors' price, as they trust much the advertisement. On this very fruitful condition, producers will commonly fix a greatly monopolistic price and convince their consumers that they have offered the best price. And while the other competitor offers the same level price, It's out of question for consumers to find the cheaper one. As a result, producers might manage a big sale, a high price and maximum profit. And while producers make up their mind to slightly mark down the price instead of other producers', the other producers will imitate this action, thereby, still is market profitable to producers.

Applying this strategy, each producer should intensively observe the price mobility in related market. Producers should give an incentive in the form of double bonus to the consumers that inform the markdown by other competitors.

3.3.2. Inducing Brand Loyalty

This strategy, with its effective advertisement method, intends to assert that producers offer the best products that cannot be substituted with other competitors' products, although the competitors offer the lower price product.

3.3.3. Randomized Pricing

In radically competitive market, producers might exercise randomized pricing. In this case, producers will randomize the day-to-day flow of commodity prices. On one day, consumers could get the cheap priced commodity, and on the other day, have the higher.

Therefore, consumers could not find other comparative prices, as the price always changes daily based on the producers. In addition, price competition hardly happens, as no price is relatively constant.

4. Other Anti-Competitive Price Fixings

On the following passages, there will be explained some price fixing strategies that could obliterate business competition and subsequently damage consumers, since they could not find other better prices.

4.1.1. Predatory Pricing

This strategy is aimed for fixing the price that on the one hand could be beneficial to consumers in the short term, but on the other hand could cause other competitors sustain a loss.

Predatory pricing is the result of unfair competition on behalf of market domination. This unfair strategy is usually based on that the offered price is admitted as a result of the performance of the firm efficiency improvement. Thereby the price fixing practice could not be soon detected until other competitors are able to estimate the lowest price that is obviously offered to consumers (while price = marginal cost).

Under the circumstances, producers might absorb greater market segment, due to consumers' possibility for finding out the cheaper price. And as consequence, other competitors miss their market segment. In the longer term, those predatory pricing actors could act as monopolists.

4.1.2. Maximum Price Fixing

Commonly, producers implement this strategy on their distributors so that they don't sell their commodities over the fixed maximum price and thereinafter the retail price competition could be in control.

For example, some flight entrepreneurs have implemented the maximum price on each travel ticket. Distributors, in this case, could get 30% discount of the maximum price. As a travel bureau, a distributor could take partly or entirely the discount but is not allowed to sell the products over the maximum price. While this travel agency takes the entirely discount, consumers would obtain the maximum price and while taking the part of it, for example 15% (to entice consumers), consumers could get the 15% lower than the maximum price.

Through the above description, we could conclude that using this strategy on the one hand might be beneficial to consumers and on the other hand might restrict the other competitors that could not compete at the agreed maximum price level. So, the producers that don't hold on to an adequate market network won't be able to control the ultimate price that is offered by the existing network.

So, to be able to apply this strategy, producers should allocate one agency in each selling post. This bureau will sell the products with the fixed maximum price. Therefore, while any competitor tries to offer the lower price, consumers will leave in throngs for the products offered by agency.

But practically, distributors usually apply the fixed maximum price, or in other words, take the entire discount. While this condition happens, consumers will certainly spend on the highest price, at least try to implement the price closely to the level of the agreed maximum price.

4.1.3. Minimum Price Fixing

This kind of price fixing usually retains these following two goals, to protect producer's reputation or certain mark and to restrict the unfair business competition at distributor level.

The well-known producer with their particular products in certain market will protect their reputation through both keeping the product quality and its design and protecting the fixed price. They will also implement the relatively high price on their admittedly prestigious products to protect producer's image.

On the other hand, at the distributor level, they will fight for that prestigious product. To send an image that producers has yielded certain classy products, producers need a marginal cost for promotion. As a consequence, the price of those who spend additional cost for advertisement will mark up so that the consumers choose the other cheaper products (without advertisement cost). The distributors who obtain benefit under these circumstances called free riders.

Due to those two main reasons, producers commonly fix the minimum price for each product. This strategy can guarantee that the products sold in accordance to their class and can prevent form the free rider's appearance.

But on the other hand, this kind of strategy restricts the competition amongst distributors. In this case, the distributors who perform efficiency still might not fix the price under the producer's price, and therefore consumers bear the relatively high price.

5. Relevant Market and its estimation

5.1. The Relevant Market

Market scope could be either extended or restricted in connection with its price or quality. What is the relevant definition for market in order to analyze business competition? To discuss further about the relevant market, let's its following components, such as the traded products (product market) and its geographic scope. The former deals with the traded goods and services, whereas the latter deals with the production location of either producer or seller. Market scope, in connection with the traded products or its location, is hardly defined, above all, while identifying whether monopoly practice has taken place. The applied definition of market can define whether monopoly practice has happened.

5.2. Product Market

The existence of the close substitutes for the sold/produced commodity will determine the product market, in which single seller operate his business (Gellhorn and Kovacic, 1994). What is the close substitute meant? For example, Company X produces the beverage containing soda named SODAX. While consumers run out of SODAX in market, could they still the typical substitution. If so, the product is called the substitutive product. So while SODAX disappears from market, still can consumers find other substitutions. The substitute closeness might be caught through the function/usage or the quality and price. Are the tinned or bottled beverage such as tea, mineral water, and fruit juice the close substitutions for SODAX? According to their usage, those beverages might be regarded as the close substitutions, but to the quality or price, they are not. So, the grounded research concerning price and quality are needed to define whether SODAX and the other beverages are in the same market.

The second step to determine whether the market is relevant for SODAX, does SODAX compete with the other products, and otherwise, do the other products restrict Company X to mark up the price. For example, X raises the price by 10 % (little but significant), will consumers move to other products? While the market is defined restrictively, it only encompasses a few of competitors or even no competitor and therefore gains a big market power. And as consequence, X might either mark up or down under the competitive price. Otherwise, while market is defined extensively, it faces many competitors and thereinafter gets a weak market power to control the price.

Another way to determine the relevant market is through cross price elasticity. The cross price elasticity for SODAX products is defined as the percentage of the other price variation, such as Y. For example the cross price elasticity value of YODAX to SODAX is 10, so, if YODAX price change 1%, the demand for SODAX changes by 10%. The cross price elasticity value of the substitutions is negative, and therefore while the price rises the demand declines. So, as YODAX price increases, SODAX rise by 1% and the demand for YODAX product declines by 10%. On the other hand, the cross price elasticity value of the complement products will be positive. The higher the cross price elasticity value of the products to the others, the higher the substitution/complement ratio. In connection with the analysis of the relevant market, the cross price elasticity value might indicate whether some products could be classified in the same market. For example Σ substitution value between SODAX and YODAX is high, SODAX and YODAX are assumed in the same market. But while Σ complement value between them is high, some policy on certain product will influence the competition ratio in the complement products market.

5.3. Geographic Market

The geographic market is market distribution in accordance with the location of the produced/sold commodity; whether the relevant market for certain products; whether the market scope is international, in Limited Island, certain province, certain region or even globally relevant to business competition analyses. In some geographic markets, a seller might raise the price without involving a new player or missing some customers.

Market determination based on geographical location is now and then simpler than that based on product. In the case of a product sold in international scale and the insignificant or disregarded transportation cost, market might be geographically defined in international scope. While a company and the competitors sell their products in certain region in which consumers have no access to other supplies, the general rule to define the market geographically is by including only the related region in the market and the calculated sales are those from the mentioned region only. (Gellhorn and Kovacic, 1994).

While the geographic markets could not be defined with the above method, It is necessary to observe the relation between the sale ratio and price ratio and its change for the other regions. The close relation among prices and the price mobility mainly influenced by sale exchange among regions indicate that those regions covered in one geographic market.

6. Market Measurement

It has been frequently mentioned that market domination reflects the market power of company, by which producers might fix the supra-competitive price and restrict the competition. Therefore, it is important to determine the definition of market and to measure the market domination.

The main goal of market domination measurement is searching for the appropriate indicator to describe the market power of each undertaking. The market definition having been determined, based either on product or on its geography, the market segment can be then measured.

First, sale is a common and a simply calculated measure. The market segment can then be estimated through determining the sale ratio of company (calculated in unit or sales value) as numerator, which is then divided by the unit or the total sales value of all market (with the fixed definition) as denominator.

But in many cases, the market segment dominated by certain company can not reflect the market domination. For example, the immense product capacity owned by company can be used as an entry barrier for other competitors and encourage the company to intimidate the others that it will overload the market while any competitor tries to enter the market. This condition will be worst while the government regulates the maximum capacity of industry. For example, formerly, our government, through BKPM, included any industry in negative list (such as any industry inaccessible for newcomers), while believing that the existing industry had fulfilled the domestic market. This regulation encourages investors to establish the big-scale fabric so as to be registered in the negative list.

The above illustration indicates that it is necessary to know the characteristic of the industry while measuring market power. In mining industry, for example, natural resources reserve owned by company might more accurately reflect the market power of company. The total tender gained by company and its technology might reflect its market power also.

Having discussed some conceptual aspects concerning market measurement, we will then talk about the means of measurement frequently used in the literature. As mentioned before, the common tool for measuring market domination in industry is CR4 standing for market concentration ratio, which points out the total market segment of four biggest companies existing in the relevant industry/market. CR4, as explained before, could not describe the competition ratio in the market all the time, as it is a static measurement that disregards the dynamic competition ratio (the turnover ratio) among companies in certain industry and the competition among the imported commodities.

Another measurement frequently used in the literature is Herfindahl-Hirschman Index (HHI). The difference between HHI and CR4 is that the latter uses only four biggest companies for calculation, whereas the former involves all market segments existing in the relevant market. The problem of the former is that the total market segment of all industries is 100%. So to escape from this difficulty, HHI will be calculated by summing up the quadrates of market segment of all companies in the relevant market.

6. Vertical Integration

Indeed, the relationship among companies in market is complicated. On the one hand, a company relies on the other to supply the basic material. On the other hand, it also depends on its distributors to sell the products. Therefore, this interrelationship now and then is not the most efficient to undertake business. However, there are some marginal benefits for the company, which undertakes the downstream and/or upstream vertical integration.

a. Economical benefit because of technological character: there is a cost efficiency due to the externality among production lines. For example, in steel industry, it is more profitable to process the steel while it is still heated. So, to have steel company and to process the steel under the same roof is more profitable than to produce sheets of the steel and to process them under different fabric.

b. Economical benefit due to certainty of contract: some companies often choose vertical integration strategy to avoid the retailing companies who transgress the contract. For example, the bottle supplier companies might reduce the cost by overstepping the procedure under contract with the beverage companies. Consequently, the bottle quality decreases and subsequently damages the beverage companies' image.
c. Economical cost due to transaction cost reduction: There might happen some possibilities in market that we could not predict all of them and write them in the contract. To reduce the transaction cost, which might happen in this unpredictable situation, those transactions are often done under the same roof.

The above vertical integrations are normal, as the desire for production cost imposes the actions. Therefore, those kinds of actions are beneficial to consumers and do not restrict competition. However, there is some less positive vertical integration:

a. Price discrimination: In the literature, there has been mentioned that a company could undertake price discrimination to increase the profit, that is to sell the product with varying prices based on the product cost elasticity. This strategy will fail while one might resale the products (the buyer who can get the cheap price resells the product to the one who is willing to pay higher). So, to avoid this resale, company undertakes this strategy. For example, Alcoa (Aluminum Company of America) monopolizes aluminum production. But this aluminum market has a low elasticity demand; therefore the monopolistic profit is low too. On the other hand, the down-stream products market is characterized with a high elasticity demand. So, Alcoa is motivated to apply vertical integration and subsequently could sell the aluminum higher than the market that has a high elasticity demand.
b. Vertical integration to monopolize industry. There are two cases to take into account:
    - While the company monopolizes the main input, which has no substitution, for the downstream companies, it does not need to apply vertical integration because it might undertake thoroughly a monopolistic power.
    - While the downstream industries input might be substituted, the company could undertake vertical integration monopolize those industries. As a result, the company could have the superiority instead of the others, as it could choose the most efficient input combination (its own input and substitution input).
c. Vertical integration to avoid multi-monopoly. For example one company monopolizes the downstream industries, and the other monopolizes the upstream one. This kind of monopoly damages the economy due to product diminution in both downstream and upstream industries. In this term, it would be better while single company dominates those both industries. Theoretically, while this multi-monopoly is erased, the output of the upstream industries increases and therefore causes the output of the downstream rises too.
d. Vertical integration to close the market. This action could be defined as business activity (including vertical integration strategy) that restricts the access of buyers to sellers or vice versa. For example, two flight companies, American Airlines and United Airlines, monopolize the computerization of flight ticket reservation in US. Those two deal with 70% of thorough ticket market. As a result, the competitors of those two companies complain about the computerization, which makes the two companies could serve more reservation than them and close the market.

It could be concluded that the impact of vertical integration on competition and efficiency isn't obvious enough. On the one hand, vertical integration could ensure cost efficiency.

On the other hand, it is used for restricting competition or promoting monopolistic profit. As a matter of fact, The negative impact of vertical integration could be clearly seen while there is monopoly practice in either upstream or downstream. While this monopoly could be handled, vertical integration is no big deal.

IV. Prohibited Action, Dominant Position and Exemption

1. Prohibited Action

There are some parties sustaining a loss due to a merger, such as the minority of shareholders, employee, creditors, and all publics. The public might suffer a loss, as merger decreases the existing competition and subsequently causes the price increase and the commodity diminution in market.

To identify when and under what circumstance merger might endanger competition is complicated enough. This section is going to describe one of the actions that are prohibited by Competition Law and to point out the most considerable side. The following passages will explain orderly about the terminology of merger, market concentration, and the provision role in connection with merger, merger principle, and the ban on merger under Indonesian Competition Law.

2. Terminology of Merger in Competition Law

The terminology of merger, while discussing competition, is defined as permanent combination of companies that are formerly separated. It does not concern whether two or only one of companies finally operated, or whether those companies combine all activities or keep on their own activities. Competition law does not care whether the merging companies change each other the stocks or perform any property acquisition. In other words, merger might be performed in the form of combination, acquisition, incorporation, amalgamation, or other types of unification. The point is that this unification replaces the independent decision-maker with the unified supervisory system, which is under operation or not. The usage of the terminology of merger, in this case, is interchangeable.

Merger, in Netherlands, covers stock merger, asset merger, and juridical merger. The appliance of stock and asset merger could be captured through one companies' taking over the other. Stock merger (usually called stock acquisition) points out the acquisition, through either public or private placement, of 50% stock or more on behalf of one company's taking over the other. According to the existing provisions, the acquisition of stock is more complicated than that of asset. Meanwhile, asset merger indicates overall assets acquisition (with or without liability) of corporation or company. The asset transfer might vary based on the asset type. For example, some should be signed before notaries and/or reported to creditor. In juridical merger, the acquired company does not exist any longer, its stockholders, assets and liabilities move to the surviving company (who takes over) under the existing provision.

Commonly, one classifies merger based on market relation within the parties that get involved in merger; they are horizontal, vertical, and conglomerate merger. The latest covers either the one that resembles horizontal merger or that resembles vertical merger.

2.1. Horizontal Merger

This kind of contract might cause three problems. First, the disappearance of competition of the merging companies would be more significant while their market segment grows. Second, The activity unification by those companies might cause a significantly big market power and make the merging companies raise the price by reducing the production by their own side only. Third, by promoting the concentration on the relevant market, transaction could strengthen other undertakings' power (that are not involved in merger) to fix the price and to determine the total product. One worry that merger could reduce the total producers in certain industries and therefore facilitate the companies (that are formerly separated) to clandestinely coordinate each other. As the transaction could coordinate each other clandestinely with more effective, the horizontal merger would be the center for focusing on interdependent oligopolistic issue.

2.2. Vertical Merger

Vertical integration is comprised of forward and backward merger. This kind of contract does not reduce the total of overall undertakings at certain market level, but can change the industrial behavior pattern. In the case of both vertical and horizontal merger at either upstream or downstream level, the acquired company might decide that it would only cooperate with the acquiring company. Consequently, this action influences the existing competition in three markets, among suppliers of the acquiring companies, customers, and competitors. The trust over internal transfer will be stronger while the efficiency, as the result of internalization, is achieved. Under the circumstances, one hopes a new company to join to yield more internal transfers referred to the more exclusive market transaction. However, only a few of undertakings lessen their purchase from outside on behalf of profit oriented. What happen then are that suppliers could miss the market for their product, that the retailers miss lack of supply, and that each competitor would find out that the supply and the market area are barred.

The above symptom impresses that vertical integration will restrict the competitors through barring the access for either production resources or consumers. However, this theory gets some critics. Joskow, for example, said that the economists assert that the closing hypothesis has been mistakenly saying that the internalization of vertical merger protects the internal transfer from market force disciplines.

On the other hand, there is still an anxiety about that vertical merger could strengthen the barrier to market entry and other companies' barrier to expansion. Vertical integration can force other companies to undertake vertical merger and competition. Consequently, the entry is suspended and the cost risk increases over the regular cost in order to be able to accumulate the capital to enter market. The company that dominates market power commonly invests in vertical integration to bar the market access and therefore lessens the benefits of competition. In such case, competition law should interfere.

2.3. Conglomerate Merger

This kind of merger consists of three types, pure conglomerate merger, geographic expansion merger, and product expansion merger. The first type implies that the merging companies do not have any economic relationship. For example, steel producer buys oil distillation producer. The second merger implies that the company buyer has the same product with the acquired company, but they have different marketing geography. While the latest is a merger in which the producing company buys the other company that produces different product, but both companies require the same production and marketing process. For example, the detergent soup producer buys the cloth-whitening producer.

Conglomerate merger might decrease the competition due to the missing access for the acquiring company to enter the purchased company market. Conglomerate merger could also modify the big company into the company that has a significant predominance, or can increase the barrier to market entry. Even, this kind of merger might reduce the existing small companies and reinforce the political power of the merging companies that menace the social and political goal of the central independent decision maker that safeguards small business and keeps alive democracy.

2.4. Market Concentration

Concentration ratio is captured through the industrial participation of a number of biggest companies. This concentration ratio could be known through the total assets, total human resources, or through marginal value, total sale minus total procurement based on certain currency value with some adjustments. This concentration does not point out the relative position or the identity of the companies included in the group of those companies and does not deal with either the distribution or the character of other companies or with the change of those factors. The measurement of merger concentration ratio is usually cited in the merger guidelines.

2.4. Several Goals of Merger

Merger might violate or reinforce the provisions of competition law, or even be abstain. In some cases, merger motivation predominantly determines the consequences of merger. Areeda and Kaplow has classified the goal of merger into the following:

1. Anti-competitive Goal
   Merger could be done for the reason of upholding monopoly or reinforcing oligopoly. Its motive could be either for product or market expansion. This kind of contract could be realized under hostile takeover. Merger also could be horizontally done amongst the biggest companies in the industry or could be in the form of conglomeration.

2. Expansion or More Simple Market Entry Endeavors
   To buy a company is more simple and economist than to establish one. To apply the merger efficiency, one might do such as training cost efficiency, management quality improvement, advertisement, market distribution lines establishment, and other business accesses. In some cases, merger could encourage competition while facilitating activities that might not exist without merger. For example, the company that takes over, which formerly could not independently enter the market, might revitalize and expand the acquired company so as to be stronger to fight.

3. The Performance of Efficiency and Economical Scale
   Now and then, merger is done for the reduction of production resources usage. Therefore, there are some issues to take into account:
   a) To obtain the economist the short-term merger occasionally could obtain fabric level. Only the bigger companies could establish the bigger company in the future, whereas the company that acts independently could not do as the big does.
   b) To unify two different companies could bring about inefficiency in the fabric or top-management level.
   c) The various big companies might accumulate the more abundant deferred profit to take in. Therefore, all divisions of the company might get the cheap capital instead

of selling the stock in capital exchange. Those companies could internally allocate their capital more efficiently than the company that has a single product.

d) Economist marketing occasionally happens but hardly identified or tracked down.

e) A relatively abundance of needed goods and services might be purchased with the smaller unit cost.

4. Financial benefit without new efficiency
Merger is beneficial to each party without decreasing production sources usage. The benefit or the efficiency could be obtained through the growth, tax reduction, unused capital, and risk diffusion.

5. Management Goal Achievement
Selling management now and then is willing to be in part of the bigger company that has a variety of products and is firmer.

6. Modifying Management
Merger is to relocate the business to a better handling. The acquiring company seeks the benefit through taking over the inefficient company, which is likely to fail to gain the profit.

7. Merger for the purpose of survival
One of the reasons that company applies merger is survival. First, because the company feels that there is a deficiency or a lack of production scale to achieve efficiency. Or there is a possibility of unfair competition practice by some competitors or a lack of certain preeminence. Second, some companies cooperate with their relative companies to avoid the acquisition by the disliked company. Third, afraid of being estranged from the related business.

8. Net Calculation
Merger has some motivations. On the one hand, it could be done in order to help only the related parties, but on the other hand, to serve the public interest. Even, it could reflect social interest in the free market (for stock, property, and companies). By the way, market is economic unit infrastructure for proposing the production resources of inefficient producers to the efficient ones to hold a mutual cooperation. It does not suggest that every exchange has to be beneficial to overall public, but at least it could provide, through merger, an entry, simple exit, and make the entry involved in more efficient production and distribution.

However, free exchange could damage competition and bring about the market force that destroys competition or to intimidate socials and political circumstance in many ways. Therefore, competition law does not allow the trade without any barrier.

It is therefore important to have a big concern in the very complicated cases, how to identify them whether it damages social condition or otherwise, be beneficial to it. In this case, the lawmaker or the elucidator should regard the public benefit of free capitalized market. However, we could not just believe that merger would not injure the public. We could not either estimate the benefit from the acquisition case only by controlling the managers from a distance. We have to be convinced that it is the result of the indicted action.

2.5. The Role of Provisions Concerning Merger

The provisions concerning merger, commonly, is to prevent from the over-limit market power domination. It is easier to prevent from market power domination than its abuse (after undergoing this market power). At certain level, company could achieve market power at the level that could be reached unilaterally, whereas the small competitor, to reach this, should always undertake bilateral activity such as by collusive dealing. Merger provisions have preconditioned social benefit on stock and property acquisition that should be displayed in the procedure of authorization. These limits are very sensitive to each settlement or exercise of competition law.

Two kinds of prohibition concerning merger in Australia would help us to identify the allowed merger. In connection with merger, there are two prohibitions, the prohibition for restricting market force accumulation, and the one for restricting the company that take the benefit of market power to damage substantially the existing competition. The second prohibition does not concern about the superiority of company but the power market abuse. Nevertheless, the limit on whether the action regarded transgresses the law is on controversy and whether the power is practically misused (for example predatory pricing) has provoked a sensitively hard problem.

The alteration of prohibition limit concerning merger in Australia will be described such as the following. The government was supposed to loosen the limit of merger from "dominant or controlling market" into" lessening substantially competition". Replying this demand, the government made up its mind to persist in the dominance test (as before) but lessened the limit of the company that might be alleged abusing market power, or from *substantial control over market* into *substantial power ratio in market*. The reason for preserving dominant test is such as to reach an efficient industry and to promote domestic product in international market competition. On the other hand, the reason of lessening the limit/category of company could be presumed abusing market power, as practically, only a few of big companies has a high efficiency. However, the big company might use the big market power, either as seller or buyer, in order to damage the competitor and competitor process. So, to protect the performance of smallest-scale company from other damaging companies, it requires the effective regulation.

The mentioned provision tolerated the market power concentration on some hands and tried to control the company's behavior in managing the power. But according to business competition commission, this regulation is insufficient, as the provision of that law did not observe attentively that whether there were still two fighting domestic undertakings in market. So, that competition was relevant to stable market segment, production resources, finance and technology, production efficiency, distribution facilities, and so forth. Moreover, the above provision did not see yet whether there are some independent small competitors surrounding the big domestic competitor and whether the surroundings had provided the access to growth. Even, this law did not attentively see that whether there was domestic big producer competing effectively with the import with protective price that represents the alternative supply sources in long-term.

Therefore, while the commission is convinced that the merger has caused the predominance, it will soon stop that merger. However, while the commission determine the efficiency and international or domestic competition force discovered in merger, but of course through authorization. In connection with the need for encouraging companies in international market competition, it is better for us to comprehend Porter's opinion about economic theory that states that international competition among big or small companies could be achieved by encouraging the leading industries to compete each other, not by encouraging them to merge.

Through the above passages, it is therefore asserted here that merger is the main tool for achieving economic efficiency and productivity. It is not only applied for achieving economic scale, combining resources and specialties of the smallest companies, but for encouraging the market to control the existing market to sustain managerial competency also. But notice, merger might also bring about market concentration that causes a high price and subsequently decreases quality, and provokes other anti-competitive behaviors. Judges seems to be confused to determine when a merger alleged to have damaged competition and whether the damaging risk of merger overtops its benefit. If the commission facilely accuses the anti-competitive behavior, the public will have no need to pay much for the current price products. However, while this action is rigidly done, the efficiency and the prosperity yielded by merger will be barred, and market, as control for company activities, will weaken. While there is no certainty on which merger should be investigated, the cost might augment. Therefore, merger regulation should encourage competition, not otherwise.

2.6. Principles of Merger

To identify the existence of competition degradation, merger exercises five steps. (1) Has merger caused significantly concentration ratio intensity and concentrated market? (2) Will the existing merger enable the opposing consequences for competition? (3) Will the available entry for restricting anti-competition be in the appropriate time and possibly emerge? (4) Will the merger yield an efficiency that impossibly obtained by the other kinds of contract?

The common standard for estimating concentration ratio, we usually use HHI (Herfindahl-Hirschman Index). HHI is the total quadrate of individual market segment of the existing undertakings in market. Therefore, in accordance with the opinion of Areed and Kaplow, while there are ten undertakings in market, in which each has 10%, the HHI shall be one thousand. HHI reflects either market segment distribution of the four biggest companies or market composition of out of these four. So, HHI is sensitive to disparity of inter-market segment. We could know whether merger has raised HHI through the total market segment of the merging companies. Merger will always augment HHI because the quadrates of the combined market segments overtop that of individual market segment.

Before determining whether a merger is worth being investigated, we ought to take some following factors in to account. First, market is regarded not concentrated while its HHI under 1000. Second, While HHI stands around 1000 to 1800 (market survey indicates that it is equal to concentration ratio of the four biggest companies 50% and subsequently 70%), the merger that augments HHI under 100 points, will not be accused. Whereas the merger that raises its HHI over 100 points will be accused as long as it is determined decreases competition.

However, there are some other things to consider, such as the determinants of market segment significance and its concentration, simple market entry, oligopolistic collaboration, efficiency, company's setbacks, and some implementation on the previous cases. Third, If its HHI is over 1800, the accuse is cancelled while HHI is under 50 points or the above determinants do not encourage the accusation. But it seems that the mentioned determinants could not save each merger that accelerate its HHI over 100 points while its post merger HHI is substantially over 1800.

The other case concerning this issue is such the following. In a market with 35 undertakings, in which one of companies controls 30% of market segment, 4 companies each controls 10 %, and 30 companies with 1% market segment. So, the total HHI before merger is 900+(4x10)+(30x1)=1330. While the first and second companies merge their market segment, it will be then 30%+10%=40%.

That merger therefore gains its post merger HHI 1600 (the result of the quadrate of 40)+(3x10)+930x1)=1930. So its HHI is obviously over 1800 or augment form 1330 to 1930 (600), it is then over 100. However, if the merger could be proven substantially decreases competition, this merger is against the law then.

2.7. Ban on Merger According to Monopoly Practice and Unfair Competition Law in Indonesia

Like the other merger provisions, prohibition on merger in Indonesia included in rule of reason. Alternatively, it is allowed while it is not substantially harmful to competition. Article 28, paragraph 1 says that entrepreneurs are prohibited from conducting merger or dissolving companies that might cause monopolistic practices and/or unfair business competition. While article 2 subsequently states that entrepreneurs are prohibited from acquiring shares of other entrepreneurs if the said action can cause monopolistic practices and/or unfair business competition. The above article asserts that merger (combination, amalgamation and acquisition) is not limited to PT or other corporations alike. Paragraph 3 of the mentioned article states that More detailed provisions concerning prohibited merger of companies as referred to under Paragraph (1) of this article, and provisions concerning acquisition of company shares as referred to under Paragraph (2) of this article, are stipulated in the government regulation. But in accordance to article 27 UU No. 5 1999, market segment domination over 50% by one or more groups of undertakings, or market domination over 75% by two or three groups of undertakings regarded per se illegal. It implies that combination; amalgamation and acquisition that are against the mentioned law are prohibited, even though they might not be harmful to competition. However, the fairness of this law is still doubted. In addition to market segment, Indonesian competition law has also regulated assets accumulation. Article 29 UU No. 5 1999 says that Merger of the companies or acquisition of shares as referred to under Article 28, causing its assets value and/or sales value to exceed a certain amount, must be reported to the Commission. Therefore, undertakings have to pass this notification procedure. It vividly differs from the Australian and American competition law. Our competition law still has big concern in the process of undertakings' being rich, whether they could promote the sales value as long as in accordance with the law and in line with the competition essence (substance) (as long as its market segment is not overloaded and this overload is not taken use), or their action could give benefits to the public.

To combine in order to be bigger, stronger and more efficient is the right of each undertaking. Under certain circumstance, this condition could encourage competition and be beneficial to all public. However, it cannot be denied that the very big companies might take use of its strength damaging competition. There are some criteria to determine when the company regarded big and strong and how it damages competition.

In order to control merger in simple and exact way, there could be used notification and authorization facilities. The key word is that merger is to be beneficial to competition, not otherwise.

The above illustration has simply illustrates one of the prohibited actions according to competition law. However, there are still some other prohibited action will be explained.

3. Other Prohibited Activities

a. Monopoly

Monopoly is the control of production and/or marketing of goods and/or services by one undertaking or one group of undertaking. Meanwhile, monopolizing means centralization of economic power by one or more undertakings resulting in the control of the production and/or marketing of goods and/or services by undertakings, thus resulting in unfair business competition and might be harmful to the public interest.

The factors that should be proven in connection with article 17 No. 5 1999 are:
a. Action of controlling over certain product;
b. Action of controlling over product marketing;
c. The control could cause monopoly;
d. The control might cause unfair business competition.

To prove the above factors, some following criteria should be fulfilled:
a. no substitution for the product;
b. strict barrier to entry for other competitors to take part in market competition of the same product;
c. The other mentioned undertakings are the ones that are competent or significant to get involved in the relevant market;
d. One or a group of undertakings has controlled over more than 50% of market segment of a type of product.

b. Monopsony

A circumstance in which a group of business controls a big market segment to purchase certain product. This single buyer then might cause monopolizing and/or unfair competition and as long as this single buyer controls more than 50% market segment of certain product or services.
Therefore, an activity might be regarded as monopsony while covering the following criteria:
a. Done by one undertaking or a group of undertakings;
b. Has controlled over more than 50% market segment of certain product.

c. Market Segment Control

Market control by one or some undertakings is regulated under article 12, 20 and 21 UU No. 5 1999. Article 19 regulates the activities that might cause monopoly practice and unfair competition, such as:
a. Rejecting or barring certain undertakings to do the same business in the related market;

b. Barring consumers or customers of other undertakings not to cooperate with the competitors/ undertakings;
c. Restricting the circulation and/or goods and services sales in the related market;
d. Committing discrimination.

d. Loss Leader Price sale

Article 20 prohibits the supply of goods or services by applying a loss leader or fixing very low price so as to evict or end competitors' business and might cause monopoly or unfair business competition.

Article 21 prohibits undertakings from cheating in setting the production cost and other expenses, which is part of the goods' and/or services' component, that can cause unfair business competition.

e. Conspiracy

Besides prohibiting some kinds of agreement, the mentioned law does not allow either the conspiracy causing monopoly practice and unfair competition. Conspiracy is a commercial cooperation within undertakings in order to control the relevant market in the interest of the conspiring undertakings.

The substance of conspiracy might not contain certain agreement to conspire, as it is difficult to formulize the substance into agreement, such as the case of stealing information from other undertakings.

Article 22 states that entrepreneurs are prohibited from conspiring with other parties to arrange and/or determine the winner of the tender thus causing unfair business competition. It is obviously a cheating action, as the tender and the winner are not regulated and are clandestine (there are some open tender though).

While article 23 asserts that entrepreneurs are prohibited from conspiring with other parties to obtain information of their competitor's business activities classified as company's secret. While article 24 says that entrepreneurs are prohibited from conspiring with other parties to hamper production and/or marketing of the goods and/or services of their competitors with the intention to reduce the quantity, quality, and the required delivery punctuality of the goods and/or services offered or supplied in the relevant market.

4. Exemptions under UU No. 5 1999

Those exemptions have been discussed in section III –1 sub-section 5.2. Some activities have been also explained including the agreements that cause monopoly or unsound competition prohibited by the Antimonopoly Law. Indeed, commonly there are some exemptions within the general provisions. Therefore, there are some exemptions too under UU No. 5 1999 that are endlessly debated. Several arguments on the reason of exemption is going to be hard burden (charge) on the Commission for business competition supervisory.

Article 50 No. 5 1999 says that the exempted agreements are those regarding patent, trade mark, copy right, industrial product design, integrated circuit, trade confidential, agreements related to franchise.

a. Franchise
   The exemption of this kind of agreement is practically accepted internationally by the laws, but it seems that it logically disregards the principles of competition law. Franchise, as a matter of fact, is simply assumed having done tying contract or reciprocal dealing. We could see the case of Mc Donald franchise.
b. Patent
   Patent to intellectual properties is indeed a kind of monopoly. The protection toward the inventor is a real incentive for efficient goal. Practically patent has the general characteristic of monopoly that is the universal law principles.
c. Agreement on determination of product technical standard.
d. Agreement for the purpose of agency in which the content of the agreement does not specifically concern about the provision of the re-supply of goods and/or services with the lower price than the agreed one.
e. Agreement to cooperate for research or living standard revitalization.
f. International agreement that has been ratified by the government.
g. Agreement and/or activity for the purpose of export that is not harmful to the need and or the domestic market supply.
h. The undertakings of small-scale business and of cooperative.

The last number concerning the small-scale business that is regulated by the law attracts the attention of the experts to debate. Some countries have exempted cooperative, such as Japan. However, small and middle-scale business and cooperative that are exempted, will create one-sided protection while not mentioned in this law, thus barring the growth of small and middle-scale business itself. And in reference to the condition of cooperative in Indonesia, it seems that it will cause the obscurity and thereby encourage undertakings to legalize their illegal actions under the shadow of cooperative.

V. Enforcement of Competition Law

1.1. Background

Legislation is a series of words that will be meaningful while it is actualized or implemented. So is the legislation concerning the competition amongst undertakings. The subjects of law, undertakings, either in the form of private or legal person, execute this kind of law. Meanwhile, competition law upholder is regulated under the competition law its self.

Competition law deals with the dispute among undertakings, while one sustains a loss due to the other undertaking's action. So, this law concerns about civil conflict. The upholding of this law could be done by the association, which is established by undertakings, as long as the case does not have any connection with the public. Now and then, the law enforcement faces some barriers while the loser does not accept the final decision. It is because the association might not confiscate or apply any public sanction.

Along with the development of competition law, the upholder begins to face the criminal case, as well as administrative too, such as the violation against competition law harmful to the public and economic condition. Therefore, both criminal and civil code enforcement are obligatory.

The procedure of competition law empowerment should orderly pass investigation, close examination, decision on who is guilty as well as the sanction. The investigation is done by police agency, prosecution by public attorney, verdict and sanction by court. However, the upholders of civil case are different from those of criminal case, although their procedure is the same.

In connection with the second type of case, the government gives in the authority to specific institution namely KPPU (Commission for Business Competition Supervisory) under the supremacy of UU No. 5 1999 concerning Prohibition on Monopoly Practice and Unfair Business Competition. At the same time, The United States employs Federal Trade Commission (FTC) and Antitrust Division of Ministry of Justice, which has the authority for prosecution.

As a matter of fact, police agency, public attorney and court could exercise the enforcement of this law. The latest institution is the official institution appointed by the government. However, in connection with competition law, the first level dispute settlement among undertakings is not done in court. The main reason is that competition law needs economic expert or someone has a big concern in business to preserve market mechanism. It is for the reason that business competition issue has a firm relationship with economy and business.

Another reason of establishing certain institution for dealing with monopoly and unfair business competition is for lessening the accumulated cases in court. This institution is then regarded as alternative dispute resolution, as long as it concerns about non-litigation case. This institution is also called Quasi-Judicature. For example, the dispute between labors and entrepreneur accomplished by Committee for Labor Dispute Resolution, meanwhile, Tax Dispute Resolution Board resolves the tax dispute, and in fact, there is a Sailing Court. Therefore, the court functions while there is an appellation due to unsatisfactory decision settled by the Quasi-Judicature Institution.

Along with the turn-up of the competition law, Indonesia expects that Indonesian world of business grow soundly and properly and that the circumstances create a sound business climate and rub off the economic concentration done by private person or certain group. This law is expected to uphold the law provisions and protect equally all undertakings in order to create sound business competition.

The law regulates many aspects concerning monopoly practice and unfair business competition. However, all laws need enforcing or exercising in order to obtain the goals. Therefore, an institution is needed to uphold the law and all provisions are in need of law structures (such as law upholder) and law enlightenment.

As referred to in Article 37 UU No. 5 1999, KPPU is the official upholder of the said law. While, according to article 44 of the same law, there are other institutions upholding the law, they are police investigator and the court.

As the law is coming into effect by March 2000, and meanwhile, as the implementation provisions of the commission establishment is still under debate, it will be insignificant to discuss the simplicity of KPPU. It is wise to discuss the theoretical and prospective aspects of the institution and to compare it with the similar institution in other countries. The comparison covers the laws concerning commission establishment, status, structure and commission membership; Duty and authority's commission and decision commission.

1.2. Juridical Principles of KPPU's Establishment

Before explaining the principles that underlie the establishment of KPPU, it is better to recognize the philosophical and sociological reasons of the establishment. The former reason is to watch the implementation of the provision regarding the authorized institution bestowed by the State (government and people). Through the authority that given by government, the institution is expected to exercise its function and duty independently.

Meanwhile, the sociological reason of this establishment is the degradation of the court image in connection with the competency in breaking the cases accumulated in court. Moreover, the world of business needs the more quick and exact accomplishment of cases, mainly the confidential. Therefore, there should be an institution comprised of the economic and legal experts.

The principles underlying the establishment of KPPU is as referred to in article 30 UU No. 5 1999 paragraph (1) that states:" To oversee the implementation of this law, a Business Competition Supervisory Commission is formed, hereinafter referred to as Commission." Some countries have authorized such institution to exercise the related law. For example, the United States employs the Federal Trade Commission, Europeans holds the European Community Commission, and Japan, Korean, and Taiwan undertake the Fair Trade Commission and so forth. Some countries have practically the provision on commission in the competition laws; meanwhile some regulate it under the separated law. The United States, in this case, does like the former, whereas Indonesia and Japan do like the later.

1.3. Status, Membership and Structure of Commission Organization

a. Status of Commission

Like other institutions in different countries, KPPU is independent, free from the influence and control of the government or other parties. Article 30 paragraph (2) states:" The Commission is an independent institution, free from government's or other parties' influence or control. Meanwhile Paragraph (3) says:" The Commission is accountable to the President." Referring to both paragraphs, we doubt whether the commission can function independently. So it needs proof, as the commission is now not established yet and has not functioned, moreover the presidential decree on this matter is still under debate.

However, as a matter of fact, KOMNAS HAM that is established based on the presidential decree, which its independence is firstly doubted is then could be realized. The independence of the commission is guaranteed with article 32 that says that it is not affiliated to any corporation. This independence is also guaranteed with the Statutes of Presidential Decree III May 1999 concerning KPPU that asserts that the member of commission is free from the influence and control of the government or other parties while dealing with any case. Therefore, the commission member shall not have a familial relationship with the accused up to the third level or have a conflict interest with him/her. The other countries that have undertaken the law concerning business competition have also mentioned that the commission is responsible to the chief of the State (President or Prime Minister). The Federal Trade Commission Act Section 1 states:"…. Any commissioners may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The Japan's Antimonopoly Act also asserts:" The Fair Trade Commission shall be administratively attached to the Prime Minister." Meanwhile, in India, the Monopolies and Restrictive Trade Commission (MRTP Commission) is established by the Government.

Thus, the independence of the commission is not significantly related to whom it must be responsible. However, it depends on the integrity of the commissioners. For example, the MRTP Commission has obtained its independence after having made a decision that becomes a benchmark judgment in Gir Prasad v. State Government of Uttar Pradesh.

To be responsible to the President is not at all extraordinary for the commission, as it applies some of the government's duties (while the highest government is under control of the president).

b. Membership

One might see the membership of the commission in article 31 UU No. 5 1999 paragraph (1) that states:" The Commission consists of one Chairman concurrently functioning as member, a Vice-Chairman concurrently functioning as a member and at least (seven) members." The words "at least seven" means that the member might consists of more than seven. This number is greater than the number defined by the Federal Trade Commission of the United States and the Fair Trade Commission of Japan that is only comprised of five. The number of commissioner employed by Indonesian Competition Law is normal in line with the Indonesian current condition.

Paragraph (2) states:" Members of the Commission are appointed and dismissed by the President upon the approval of the House of Representative." The members of commission, which is dependent upon the DPR's approval, are expected to have the integrity of personality and expertise and thereby to do their duty in the name of the overall people's interest through their independence.

The approval of the people is very determining to promote the commission's credibility. This practice is also done in Japan and the United States. However before bestowing its approval, DPR shall concern about the preconditions of the commission membership as referred to article 32 UU No. 5 1999. Such as high personal integrity, not affiliated to any corporation, and the most important, having experience in the business sector or has knowledge and expertise in law and/or economy.

Therefore, it is very considerable to look over the precondition of the membership, moreover, regarding the preconditions of the Commission Chairman that is going to maintain the performance of the Commission. Section 1 the Federal Trade Commission of the United States has concerned about the above matter. Whereas article 31 UU No. 5 1999 does not explicitly mention this provision. But the Statutes of Presidential Decree III May 1999 on KPPU have asserted the matter. Section III article 18 paragraph (2) states: "Chairman of commission and vice-chairman are appointed from and by commissioner."

c. Structure of Commission Organization

Article 34 UU No. 5 1999 concerning Structure of Commission Organization states: "Provisions regarding the structure of the organization, duties, and secretariat function and working group shall be regulated by the President's decision." This decision of the president is still under debate. As illustration, according to the Statutes of Presidential Decree III May 1999, structure of commission organization is comprised of commission members and secretariat (article 6). A commission general secretary that controls over some subordinate bureaus leads the commission secretariat. Those bureaus are such as Administrative, Legal, Economic and business, Investigation, and Cooperative Relation Bureau (article 14). In the long term, the commission might require some branches, which has been already accommodated in article 3 paragraph (2) of the Statutes of Presidential Decree III May 1999 that states: "The commission might set up any branches in Province while needed." This provision will be much more significant while the territorial autonomy is fully employed.

The structure of the commission is relatively sufficient, as it covers the fields/bureaus that are relatively close to business competition affairs. Each bureau has its own function and duty. The Administrative Bureau is in charge of administrative service, civil service, finance, statistic organization, and Commission's internal affair. Legal bureau is responsible for provision settlement concerning monopoly and business competition, study, research, aid and legal instruction. Economic and Business Bureau is in charge of research, investigation and study on economy and business. Investigation Bureau is responsible for supervisory and investigation of case. Cooperative Relation Bureau is responsible for publication, documentation, and cooperation among national or international institutions.

The Broad Outlines of the structure of the commission organization is not too different from the organization structure of Japan's Federal Trade Commission. The later commission is comprised of Commissioner, General Secretary, Hearing Examiners, Secretariat, Economic Relation, and Business Competition and investigation bureau. In accordance with the total existing bureau, the organization structure of Indonesian Commission is nearly the same with that of Korea. However, the Korean Commission consists of Bureau for Health Trade policies, Bureau for Monopoly Provision, Bureau for Business Competition, Investigation Bureau, and Bureau for Consumer's Protection.

Referring to the organization structure illustrated in the Statutes of Presidential Decree III May 1999, we find one significant bureau or division (That is usually included in the organization structure of other countries' commission such as in the United States or Korea) that is not included in ours, General Counselor. However, as long as the commissioners function properly, the absence of this Counselor does not have any significant influence.

Meanwhile, the Statute III also regulates the structure of organization, duty, and secretariat function, office representative in the capital of the province, gives in the maintenance to the Commission. To regulate those matters is complicated enough, mainly, because it is the first time settling up such institution. Therefor, the member of the Commission should learn from the Commissions of the other countries. Considering the number of the secretariat staff, and the relevant bureaus to Indonesia, we might compare it to the Japan's. Up to December 2 1992, the total staff of Japan's Commission is 484 persons. Meanwhile the Civil Employee of the European Economic Community is about 20.000, which the majority of them work for the Commission. While, the United States employs 110 persons excluding the staffs of the representative offices in 10 federal states.

So, the total commissioner needed depends on the organization structure of the general secretary and of the bureaus. The Economic and Business Bureau, for example, might settle up the organization structure based on the assigned duty. Therefor, this bureau might establish such as Research Division, Investigation Division, Division on Economy and Business Study, and based on those divisions, the total staff could be determined.

The total staffs and the fund of the Commission shall be considerably taken into account, as it relates to the efficiency and effectiveness of the organization. In line with this, article 37 APBN (National Budget) regulates the needed cost for the activity of the Commission. However, the commission, as in accordance with the mentioned provision, might get the fund from other resources.

1.4. Duty and Authority of the Commission

a. Duty of the Commission

The duty of the Commission is regulated by article 35 paragraph (a) UU No. 5 1999 that states that Commission is conducting evaluation of contracts that might cause monopolistic practices and/or unfair/unhealthy business competition. For example, oligopoly, price discrimination and/or price fixing/ predatory pricing, market allocation, boycott, cartel, trust, oligopsony, vertical integration, exclusive agreement, and agreement with foreign countries. Meanwhile paragraph (b) asserts that committee is conducting evaluation of business activities and/or undertaking's behavior that might cause monopolistic practices and/or unfair/unhealthy business competition, such as monopoly, monopsony, market domination, and conspiracy. At the same time, paragraph (c) states that committee is conducting evaluation if there is any or not domination position that might cause monopoly practices and/or unfair/unhealthy business competition. This condition might take place due to domination position, multi-position, share holding, combination, amalgamation, and acquisition.

In other words, commission's duty is evaluating whether prohibited agreements or business activities have happened. While the commission has decided that the prohibited agreements or business activities have taken place, this institution might stop those kinds of activities.

There are some other duties of the commission in accordance with article 35 (paragraph e and f) that are interesting to be concerned, providing suggestion and consideration on government's policy related to monopolistic practices and/or unfair/unhealthy business competition and setting up guidelines and/or publication related to the law.

The commission is expected to pro-actively influence government's policy in making the provisions concerning monopoly practice and/or unfair business competition. For example, in case the commission find out some articles of UU No. 5 1999 are not supporting their duties and authorities, this commission might propose any suggestion and consideration to the government to issue the more supporting provisions. In this term, the commission for European Economic Community proposes to Cabinet to bestow certain authorities to the commission. This proposal is based on the fact that the authorities obtained from article 85 and 86 of Rome Agreement considered unhelpful to the enforcement of competition law of European Economic Community.

Therefore, the commission should set up the guidelines either for its self or entrepreneurs. For example, the judicial procedure of the commission in UU NO. 5, Is it defined profoundly? Otherwise, the commission has to settle it. The Federal Trade Commission, in connection with this, issues Trade Regulation Rules that determine the substance of FTC act for certain industries. FTC, along with Justice Department, issued the Justice Department/FTC 1992 Horizontal Merger Guidelines. While, article 35 paragraph (f) UU No. 5 still needs deeper elucidation on whether these guidelines for both the commission and business undertakings or for the commission only or undertakings only. Therefore, it needs interpretation for this paragraph.

Thus, the integrity and independence of the commission are decisive to complete the setback of the provision or the guidelines of business competition. Moreover, the commission is expected to anticipate political intervention of other parties.

b. Authority of the Commission

The authority of the Commission, which is clearly regulated in article 36 and 47 UU No. 5 1999, is divided into two, passive and active authorities. The former authority is collecting the complaints from public and/or undertakings about whether the monopolistic practices or unfair business competition has happened. The latter is conducting any study, investigation, concluding the result of investigation, calling the undertakings, the related witnesses, asking for help from police investigator, demanding the clarification from the related government offices, getting and investigating some documents and other proofs, deciding and determining and giving administrative sanction.

The authority given by UU No. 5 is vast and in such detail that is not much different from those of other countries. However, there some authorities not possessed by our commission, such as the authority for bringing the case concerning monopoly practices or unfair business competition before court. FTC owns such authority by which the commission might bring the civil case before district or federal court dealing the business competition case. Japan also has this authority particularly concerning *holding company, filing merger, and waited period of merger.*

The absence of this authority in Indonesian Commission is going to be a problem while the decision bearer does not accept what the commission has decided, whereas no appellation is possible in accordance with article 44-paragraph (2) UU No. 5. The commission might only give in the case to the police investigator, attorney and civil investigator. The validity of the investigation is surely doubted, especially while done by the attorney and the police investigator, as they both don't have competency in economic and business know-how. While, the credibility of civil investigator is also questioned, as the provision of this article contains ambiguity and vagueness.

Therefor, it is important enough to bestow the authority to the commission to defend the decision, bringing the case before court while the case related to public interest. Let the court tests the decision of the commission. On the other hand, while the accused is not satisfied with the commission's decision, he/she might bring the case to the Court.

In contrary, our commission has the authority not owned by other country commission, giving criminal sanction. It's strange, isn't the authority of the court as yet? So the article needs more deep interpretation.

1.5. Commission's Decision

UU NO. 5 does not vividly regulate the decision procedure of the commission. Article 43 paragraph (3) only says that the decision-making shall be conducted in the meeting of the court that is attended by at least three commissioners. This is further regulated in article 5 the Statute of Presidential Decree III that states that the decision making by the commission that is conducted in the meeting of the court that is attended by at least three commissioners shall be signed by all Assembly members.

This kind of decision-making is also done in other countries. However, unfortunately the procedure of this decision-making is not distinctively described in either UU No. 5 or the statute of the Presidential Decree.

What occurs to the writer's mind is that the concept of this provision is much influenced with the provision of decision making of the court in public jurisdiction, in which the decision is regarded as the decision of the court, even though there is one or more members of the court do not agree with the decision. The decision paper should contain all members' opinions with their reasons, therefor, public could know the credibility of the judges. Therefore, it would be better if the decision-making is conducted by voting so that the approving or the disapproving commissioners and their reasons would be publicly recognized and documented. By then, the credibility of each commission might be known through their decision.

As a matter of fact, we still cannot evaluate the performance of the commission as yet. But we might propose some possibilities of the commission in accordance with UU No. 5 1999 and the Statute of the Presidential Decree, and compare it with the commission's performance in other countries. Hopefully, the performance of our commission is going well.

2. Law Enforcement Institution

It is necessary to know that the procedure dealing with the competition law violation differs from the regular case. The former case can't be brought immediately before court, but must be faced in KPPU, that is then called Commission.

Here, the commission takes great part in the law upholding, but the other law upholders do too. Those law upholders are such following.

2.1. Investigator

Before knowing deeply the relation between the investigator and the competition law upholder, it is better to look into the investigator and the related provision. The provision dealing with the investigation is based on the Criminal Code, UU No. 8 1981 that is finally called KUHAP. As referred to KUHP, investigator is Indonesian police official or certain civil official authorized by Law for conducting investigation (article 6 KUHAP). This police official shall be at least a lieutenant two assistant and the civil official must be at least Strata II/b (Pengatur Muda Tingkat I). If the required police official is not found, the police sector commander, who is a bintara (the lowest grade of soldier) straight under the lieutenant two-assistant might takes over the position. The head of Indonesian Police appoints Indonesian police official. While, the civil is appointed by the minister through the proposal of the related department.

There is also an investigator assistant helping the main investigator, this assistant shall be the Indonesian police official with sergeant two appointed by the head of Indonesian police office or through the proposal of his/her commander. Meanwhile the civil investigator assistant is a Strata II/a (Pengatur Muda) or the equalized strata and is appointed by the head of Indonesian police headquarter by the proposal of the related commander or head.

While the civil investigator finds out the criminal case, he/she must report to police investigator as referred to in article 107 paragraph (2) KUHAP and the result is then submitted to general attorney (prosecutor) through Indonesian police investigator.
The investigator as referred to article 6 KUHAP is authorized to:

a. collect the report or complain from anyone about criminal action;
b. conduct primary action in the place of action;
c. stop the accuses and ask the identity;
d. arrest, bring in jail, frisking and confiscation;
e. conduct confiscation and investigation of document;
f. take the finger print and picture somebody;
g. call up somebody in order to hear his testimony or bring him as a witness or an accused;
h. get some expert relating to the case;
i. cease the investigation;
j. perform any other responsible actions based on the law.

As referred to in article 41-paragraph (2) the Competition Law, while the undertaking refused to be interrogated or to give the needed information in the investigation and/or the interrogation conducted by the commission, this investigation will be authorized to the investigator as regulated in paragraph (3).

The report or the complaint from the commission proposed in written and signed by the reporter (commissioner). In case the report is not written (orally), it shall be written down by the investigator and signed by both investigator and commissioner. Having accepted the report or complain, the investigator has to give the receipt of the complaint or report to commissioner and then conduct the needed investigation. But while the investigator is in the beginning of investigation comes across the criminal case, he/she must report it to the general attorney (prosecutor).

The interpretation of in the beginning of investigation is while there have happen such coercive actions such as projusticia vocation (pemanggilan), arresting, bringing in jail, confiscation and so forth. In this term, the violation against the competition law needs no jailing, as the sanction is under 5-year imprisonment. While according to article 21 paragraph (4) KUHAP, imprisonment is conducted for the criminal action that is with 5 year sentenced or more or the criminal sanction that is regulated by article 21 paragraph (4b) KUHAP.

Having accomplished investigation, the investigator shall deliver the result to the general attorney. The investigation is regarded accomplished after 14 days of the delivery or before 14 days after the notification of the general attorney to the investigator. The general attorney then determines whether the report is eligible to be delivered to the court.

While the result of the investigation suggests prosecution, the accusation letter shall be soon made. This accusation is as referred to in article 41 paragraph (2) UU No. 5 1999 that employs in minimum penal sanction one billion rupiahs and in maximum five billion rupiahs or three month imprisonment.

Besides with a threat of sanction towards the violator of article 41 paragraph (2), violation against article 4, 9 up to 14, 16 up to 19, 25, 27 and 28 will be threatened with penal sanction at least 25 billions or 6 month imprisonment (article 48 paragraph (1)). Moreover, paragraph (2) mentions that the violation against article 5, 8, 15, 20 up to 24 and 26 the competition law will be threatened with in minimum 5 billion and in maximum 25 billion rupiahs or 5 month imprisonment.

The general attorney with the accusation letter then brings the case to the State court. The letter must contain the date, signification and must also include:

a. Full name, place of birth, age or date of birth, sex, nationality, address, religion and job of the accused;
b. The vivid, detail and complete description concerning the accused criminal action with the place and date of action.

2.2. State court

The court functions as law upholder too like the investigator. But the case dealing the business competition case must be reported to the commission before being brought before court.

The authority of the commission is vast as referred to in article 36 UU No. 5/1999, as the following:

a. collecting reports from public and/or undertakings concerning presumption of monopoly practice and/or unfair business competition;

b. conducting any research concerning presumption of that there are damaging business activities and/or undertaking' action that cause monopoly practices and unfair business competition;
c. investigating and/or examining cases concerning monopoly practices and/or unfair business competition reported by public or undertakings or found by the commission in the result of investigation;
d. concluding all results of investigation and/or examination on the existence of monopoly practice and/or unfair business competition;
e. requesting the presence of all undertakings presumed to have violated against the competition law;
f. requesting the presence of witnesses, expert witnesses, and all relating people knowing this violation against the law;
g. asking investigator to summon undertakings, witness, expert witness, or all people as referred to alphabet e and f, which don't reply the summon of commission;
h. demanding disclosure from any government office in connection with investigation or examination on undertaking presumed to have violated the competition law;
i. obtaining, examining and/or evaluating the documents and/or other evidences advantageous for investigation and/or examination;
j. deciding and determining on whether there has been a loss in other undertakings or public;
k. informing the decision of the commission to the undertaking assumed to have practiced monopoly and/or unfair business competition;
l. charging administrative sanction on the undertakings having violated the provision of this competition law.

With the approval of the commission, undertaking might propose an appeal to the state court after 14 days starting from the summon day and the state court then investigates and determines the appeal. The decision of the state court cannot be appealed to the high court, but to the Supreme Court.

Therefor, the state court might only investigate, judge, decide the case while there is an objection to the decision of the commission. Otherwise, the decision of the commission is admitted legal, having executive power (in kracht), shall be ratified in the state court.

Besides examining and determining the appeal of the undertaking, the state court also deals with the cases given by investigator through the general attorney. Those cases concerning violation against the business competition law whose criminal sanction is regulated by article 48 and the additional criminal sanction as referred to in article 49 UU No. 5/1999.

Although the commission might hold a court and decide the cases, but the executive power of commission's decision is only obtained through the state court.

But, the decision of FTC in the United States might be appealed in Federal Court. So, although FTC might hold the court, to certainty the pre-decision and to strengthen its legal ordains on the violation cases, the FTC Commission should ask for aid of the Court. The Japan High Court holds its own jurisdiction on all cases based on JFTC and cases related to indemnification for loss based on section 25 AMA.

2.3. The Supreme Court

The next institution having part in the competition law enforcement is the Supreme Court, as the undertaking objecting to the decision of the State court might propose an appeal to the Supreme Court. The kasasi (appellation) is one of the Supreme Court authorities as the highest watcher for all inferior courts. According to Soepomo, kasasi is the Supreme Court authority for enforcing and repairing the law, while the law is denied by the judge's decision at the highest level. Soebekti says that the duty of the Appellate Court is examining whether the decision made in the inferior Court is correct in accordance with the law. While the decision is against the law, it shall be cancelled.

The definition given by Soebekti is clear enough. The word law in "against the law" is used in either formal or material law, which covers either public or private law. Violation against the Code is the reason of canceling the court decision or judge's determination. The authentication of the evidences is not the charge of the Appellate Court. UU No. 14 /1985 on the Supreme Court does not formulate the definition of Kasasi. However article 30 says that the Supreme Court at the Appellate Level might cancel the decision of overall courts, because of:

a. not having authority or transgressing the limit of authority;
b. misapplying or transgressing the current law;
c. not submitting to the provisions that might cause the cancellation of the decision.

As referred to in article 45 of the competition law, the objecting party to the decision of the state court might propose an appeal to the Indonesia Supreme Court. The proposal might be in oral or written statement through the advocate of the related state court. This proposal shall be also accompanied with the memory of appellation. The proposal is not accepted without this memory.

This memory of appellation should also contain the exact reason of the appellation. While the reason is not clear and exact, such as "the decision of the court is incorrect" or"Judex Facti has misapplied the provision" or " The appellation proposal is submitted to the Supreme Court", are very minimum reason and shall be rejected by the Supreme Court. The Contra-party might propose the contra-memory to refuse the memory of appellation.

Based on article 50 the Supreme Court Law, the examination of appellation is conducting by the Supreme Court based on letters, and if its deemed necessary, the Supreme Court might hear each party or witness or ordain the state court maintaining the case to hear each party or witness. While the Supreme Court cancels the decision of the Court and judges the case by its own authority, The authentication provision is what is used at the first level court (the State court).

Article 45 paragraph (4) UU /1999 decides that the Supreme Court shall give the decision in 30 days starting from the Appellation Proposal delivery. Of course, with this very limited day, the performance of the Supreme Court is doubted to accomplish the cases.

Although the Commission, as the competition law upholder, owns the vast duty and authority, still does it need the aid of other institutions so as to make effective decision. As a matter of fact, the Commission is only authorized for giving administrative sanction, while, giving the criminal sanction is the Court's authority.

3. Case Handling Procedures of Competition Law cases ; Monopolistic Practice and Unfair Business Competition

While Indonesia has not had yet the specified competition law, the policy and the intervention of the government in the last economy has created inefficient and uncompetitive industrial structure. The government's policies have barred the entry of other competitors into market. Thus, the turn up of the oligopolistic market structure is inevitable, some companies disputing over determination of the price and market allocation. The barriers made by the government have brought about the producers with the high cost and profit. The efficiency of the companies is not optimal, as they don't have to deal with competition, and might get the unlimited profit (by getting the extra cost form consumers). Those companies have damaged the small-scale businesses. For example, the big-scale business sectors have dominated the raw materials and have cornered the small-scale business by employing the very high priced raw materials.

The above Indonesian business competition condition surely does not have any space in the world of free competition, as the free market is only open to efficiency, innovation, more qualified products, and is oriented on consumer's amenity.

Most of the countries in this world dislike giving the one-sided attention to certain party, thus creating monopoly practices. The public wishes the fair business competition. For example, In Europe, the freedom of competition is regulated in the Treaty of Rome 1957 article 85 and 86.

So, Our law UU No. 5/1999 is expected to be able to uphold the fair business competition. The Indonesian undertakings who still practice unfair, inappropriate business and against section III, IV, V of the law, might still restore the practice in 6 month starting from the launching of the law (article 52 paragraph (2)). And when the undertaking transgresses this provision, shall be punished with either administrative sanction by KPPU or the prime (pokok) or collateral (tambahan) criminal sanction by the Court.

3.1. Case Processing at KPPU – Report from Public

Concerning the business competition law upholding, KPPU is the authorized institution, which has the big authority, from accepting the report from public or the one sustaining a loss to giving administrative sanction to the undertaking found guilty of violating the provision of UU No. 5/1999. Moreover, the commission is also authorized to investigate the undertaking suspected having violated the law (article 40-paragraph (2)).

Encompassing the case on monopoly practice and unfair business competition is far different from facing the ordinary case at the first level court (State court). The first authorized institution to deal with such case is KPPU, or it is not immediately brought before the Court.

The parties (consumers) or undertakings who sustain a loss or the public or anyone knowing that there is a violation against the law (competition law), such as:

a. price fixing agreement amongst competitors in the same market,
b. predatory pricing agreement, market allocation agreement,
c. cartel,
d. loss leader pricing
e. and other activities prohibited by this law,

might report it in written to KPPU with complete description on the violation, as well as the identity of the reporter.

KPPU, as an independent institution, free from the influence of the government and other businesses, shall keep the identity of reporter in secret (article 38 paragraph 4). So, every body has not to worry about reporting the violation, as the law guarantees him. And the commission has to conduct a preliminary investigation, after 30 days, the commission has to whether the sequel of investigation is needed (article 39 paragraph 1). While it is no need to do further investigation, the case is closed then.

3.2. Sequel of Investigation

While the sequel of investigation is deemed necessary according to KPPU, so, the next process will be passed through. At this investigation step, the investigation has been done to the reported undertaking (article 34-paragraph (2)). Besides investigating the undertaking, the Commission might interrogate witness, expert witness and/or other parties, and this duty shall be accompanied with the assignment letter.

While the commission interrogates/investigates, the undertaking or other parties shall submit the evidences needed (article 41 paragraph 1), and are prohibited to refuse investigation or to give the information they really know. While they refuse, the investigator as referred to the provision (article 41 paragraph 3) will interrogate them. The investigator shall be in accordance with the provision of KUHAP (UU No. 8 1981; Kitab Undang-undang Hukum Acara Pidana).

Based on article 1 item 1 KUHAP, investigator shall be the Indonesian Police Official or Government Civil Employee that is authorized in accordance with the law to conduct the investigation. Therefor, while the case has been at the investigation level, is not only taken care by the Commission, but by Police Agency also. The Commission will give in all cases to the investigator, not only the criminal cases (those who refuse to be investigated, to give the related information needed in investigation and/or inquiry, or who trouble investigation or inquiry), but the cases investigated and inquired by the commission also.

3.3. The Period of the Sequel of Inquiry by the Commission.

At this step of inquiry, the Commission shall accomplish the inquiry by 60 days, starting from the first day of inquiry. In other words, the Commission shall have accomplished examining the evidences such as witness' testimony, expert's testimony, papers and/or document, instruction or description of undertaking. But if the Commission cannot accomplish this very hard job after 60 days, due to complicated cases or numerous witnesses to inquire, the period could be then lengthen in 30 days in maximum as referred to in article 43 paragraph (2). After finishing this inquiry, the Commission shall decide whether the violation against the competition law has really occurred.

3.4. Commission's Decision.

In the name of the certainty of law, the result of the investigation shall be recited in the open session and then informed to the related undertaking.

While objecting to the decision of the commission, the undertaking might then propose an appeal to the state court within 14 days after the notification. And while the limited period ends up and the undertaking does not object to the decision of the commission (article 44-paragraph (3)), the decision then has a judicial power. The undertaking, therefore, has to submit to the decision of the Commission in 30 days starting from the notification period, and the undertaking has to report the implementation to the Commission.

In connection with the decision of Commission, according to article 47, The Commission is authorized to such following administrative sanctions:

a. annulling the agreement as referred to in article 4 up to 13, 15,16, and or;
b. ordaining the undertaking to call off vertical integration, such as by annulling the agreement, converting some of the companies to other undertakings, altering the circle of the production.
c. Ordaining the undertaking to stop the activities that cause monopoly practices and unfair business competition and/or damages the public; and/or
d. Ordaining the undertaking to cancel the dominant position; and/or
e. Enacting the cancellation of combination or amalgamation of the companies and share acquisition as referred to article 28, and or
f. Ordaining the undertaking to pay for compensation of the loss sustained by other undertakings or parties.
g. Ordaining the undertaking to pay the penalty in minimum Rp. 1.000.000.000,00 and in maximum Rp. 25.000.000.000,00.

3.5. The Difference of KPPU and Other Commissions in Different Countries

While discussing on how this institution (KPPU) encompasses business competition cases, how uses the authority to execute the administrative sanction, we'd better also compare it to other commissions in other countries, such as Federal Trade Commission (FTC) in the United States that has a very extended authority.

Section 5 FTC Act bestows the Federal Trade Commission the big authority to control the corruptive ways of business competition and business organization. In fact, the amendments /collateral provision, especially in 1975, has expanded the authority of the Commission so that might also conduct the investigation on the violation cases. It could be seen through the Antitrust Law. The commission shall make a report and recommendation to the Congress in respect with the legislation. The FTC might also disseminate the trade regulation/provision that defines the corruptive practice in business. The commission has outlined the definition of corruptive organization of business, it is too widespread though. The FTC only exercises some of the investigation, due to the oral/written communication with the public and the business firm. The mechanism of FTC enforcement is Cease and Desist Orders (ordains to cancel organization practice or certain activity) against the violation of FTC provision. The business sector that is against the order, will be penalized $10.000 a day during the violation days. The order of Cease and Desist could be appealed to the Court.

It is too complicated to be compared the structure of the business competition case solving in the United States to Indonesian's. But what we might concern about the American condition is that the economic and legal expert has the equal role in policy decision. There are four levels of business competition law upholding: Department of Justice, the only institution executing criminal sanction; Federal Trade Commission, the Commission partner, has only the civil jurisprudence (since 1941); the private sectors that might sue three times of compensation for their loss; and the implementation at the state level, not at the federal level. The implementation at the state level usually gives more protection to the consumers. FTC is held because the incompetence of the court in encompassing the business competition problems. Although there might be an objection to the FTC's decision, the courts submit to the authorities and the expertise of FTC.

Meanwhile, the European Union employs the business competition Commission as referred to the Rome Agreement (1957, the main laws of European Union). The objection to the commission's decision might be brought before the European Court. Like many other European Countries, the commission applied the Federalism Subsidiary; the decision making is left to the National Commissions (Individual States), while they are competent to manage it and this decision is only related to single state. The Commission of the European Union varies in structure and law implementation. Netherlands, England, Italian have the weak implementation of business competition policies, but this implementation has gradually changed under the control of the European Union Commission. While, Germany has implemented the law strictly. Germany thought that the fact that only a few of big companies violate the business competition law and the presence of Cartel have helped Hitler to reach the crown in the past. So, they try to avoid it.

Through the illustration of the business competition Commissions in other countries, we might see that the decision of the Commission will be accepted and done while the reporters/ undertakings, and while the commission is independent and has the expertise in authority and duty. But most of the countries say that commission decision might be appealed to the Court. So is in Indonesia, while unsatisfied with the decision of the commission, the related party might propose an appeal to the State court at least 14 days after the notification.

3.6. Proposing an Appeal to the State court

The KPPU's decision that has been accepted by the undertaking in 30 days after the notification must be implemented and reported to the commission (article 44 paragraph 1). But while the decision is not completely done, the commission will give in the case to the investigator in accordance with the provision. The commission's statement might become the evidence/permit for the investigator to begin the investigation (article 44 paragraph 4 and 5).

Like many other case decisions, the decision might also then be appealed to the high court, as the state court functions as the first level court. But for the business competition case the decision of the commission will be appealed to the state court, not the high court.

The undertaking might object to the decision of the Commission (KPPU) (article 44 paragraph 2). While the state court accepts the objection from the undertaking, this institution shall examine this document in 14 days starting from the day of acceptance (article 45 paragraph 1). Moreover, the state court is ordained by the law to give the decision within 30 days beginning from the day of investigating the appellation (objection).

These schedules, given by the provision of the above articles, require the more professional court, the competent judges, and the human resources with business competition broad-view. While these requirements fulfilled, the certainty of law, especially concerning the quality of decision and the implementation of the time schedule might be guaranteed. The law enforcement can not only be supported with the settlement of new provisions, but with the qualified human resources with legal know-how and who are professional in applying the duty and authority also. Therefore, to improve the quality human resources (judges) so as to be able to encompass the business competition cases, the recommendation of the legal reformation team should be taken into account. The team recommend that the judges and other judicial personal shall be trained and re-educated and shall always go on studying on the justice affairs either in or out of the country.

While the Indonesian judges are qualified and understanding well the competition law, and are supported with the good technical factors in court, the 30 days period is sufficient to make the decision.

While dealing with the business competition case, the court might employ the prime or collateral sanction to the violator of UU No. 5 1999.

Article 48 states that the transgressor of article 4,9 up to 14, 16 up to 19, and 25, 27 and 28 shall be penalized with Rp.25.000.000.000,00 in minimum, and with Rp.100.000.000.000,00 in maximum, or 6 months of imprisonment in maximum. While the violator of article 5 up to 8, 15, 20 up to 24, and 26 shall be penalized with Rp.5.000.000.000,00 in minimum, and with Rp.25.000.000.000,00 in maximum, or 5 months of imprisonment in maximum. The violator of article 41, on refusal of being investigated or interrogated or of submitting the evidences, shall be penalized with Rp.1000.000.000,00 in minimum, and 5.000.000.000,00, or three months of imprisonment.

Besides the prime sanction, the violator of the provision might be penalized with the collateral sanction as referred to in article 48. For example, licensee revocation, ban on the undertaking to hold any position in company 5 years in maximum; cancellation of the activities that are considered harmful to other parties (article 49).

3.7. Appellation to the Supreme Court

The last endeavor of the undertaking to obtain his/her right concerning business competition case is bringing the case to the Supreme Court. While he/she object to or refuse the decision of the state court, he/she might bring the case to the Supreme Court within 14 days. On the other hand, the Supreme Court should announce the decision in 30 days that begins from the day the appellation is accepted (article 45 paragraph 4).

UU No. 5 1999 arranges the period of each investigation step or decision making, either at Commission or district or supreme court. However, these provisions might run well while supported by the medium, infrastructure and the involved human resources, either in government environment, world of business, and the related institution. The following schedule concerns the procedure of investigation guidelines of business competition case.

Procedure of Investigation

KPPU

Preliminary Investigation

Sequel of Investigation

While other Sequels of Investigation is needed (b) 30 days (article 43 paragraph 2)

Decision
$\leq$ Day (article 43 paragraph 3)

Accepted
$\leq$ 30 Days (article 44) paragraph

Refused

State court

Decision < 30 Days
(Article 45 Paragraphs 2)

Decision of Supreme Court
< 30 Days
(Article 45 Paragraphs 2)

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